(6)

No. 03-750
Title: Gary Sherwood Small, Petitioner
v.
United States
Docketed: November 24, 2003
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (02-2785)
Decision Date: June 23, 2003
Rehearing Denied: July 23, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 10 2003	Application (03A316) to extend the time to file a petition for a writ of certiorari from October 21, 2003 to November 20, 2003, submitted to Justice Souter.
Oct 15 2003	Application (03A316) granted by Justice Souter extending the time to file until November 20, 2003.
Nov 17 2003	Petition for a writ of certiorari filed. (Response due December 24, 2003)
Dec 18 2003	Order extending time to file response to petition to and including January 23, 2004.
Jan 21 2004	Order further extending time to file response to petition to and including February 23, 2004.
Feb 23 2004	Brief of respondent United States filed.
Mar 10 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 29 2004	Petition GRANTED.
May 3 2004	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 14, 2004.
Jun 10 2004	Motion to dispense with printing the joint appendix filed by petitioner.
Jun 10 2004	Brief of petitioner Gary Sherwood Small filed.
Jun 28 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 13 2004	Extension of time within which to file respondent's brief on the merits to and including August 16, 2004.
Aug 16 2004	Brief of respondent United States filed.
Aug 23 2004	CIRCULATED.
Sep 1 2004	SET FOR ARGUMENT Wednesday, November 3, 2004.
Sep 10 2004	Reply of petitioner Gary Sherwood Small filed. (Distributed)
Oct 4 2004	Record received from U.S.C.A. - Third Circuit. (1 box)
Oct 12 2004	Record received from U.S.D.C. Western Dist. Pennyslvania. (1 box)
Nov 3 2004	Argued. For petitioner: Paul D. Boas, Pittsburgh, Pa. For respondent: Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

GARY SHERWOOD SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The statute in question, § 922(g)(1) of Title 18, United States Code, makes it unlawful:

> (g) . . . for any person
>
> > (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year:
> >
> > . . .
> >
> > to possess in or affecting commerce, any firearm.

In the instant matter, Petitioner's only conviction occurred in Okinawa, Japan, and it was this Japanese conviction that served as the predicate felony in this § 922(g)(1) prosecution. The Petitioner filed a motion to dismiss the indictment arguing that foreign felonies were not intended to count as the term "in any court" means any court in the United States. The motion was denied. While the third Circuit's affirmance of the lower court is consistent with a 1989 decision of the Fourth Circuit and a 1986 decision of the Sixth Circuit, the Tenth Circuit in 2000 and the Second Circuit, on August 27, 2003, held that foreign convictions do not count. Consequently, a clear conflict exists among the five Circuit Courts which have addressed the issue.

The question presented, therefore, is whether the term "convicted in any court" contained in 18 U.S.C. § 922(g)(i) includes convictions entered in foreign courts.

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Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Cindrich, D.J.) denying Petitioner's motion to dismiss the indictment (Appendix B) is published at 183 F. Supp.2d 755 (W.D. Pa. 2002) (Appendix A). The Court of Appeals' opinion (per Magill, SCJ, joined by Rendell and Ambro, CJ) is published at 333 F.3d 425 (3d Cir. 2003). The Court of Appeals' order denying rehearing is not otherwise published. (Appendix C).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on June 23, 2003, and denied rehearing on July 23, 2003. (Justice Souter subsequently extended the time to file this Petition for a Writ of Certiorari to and including November 20, 2003.) Petitioner invokes this Court's jurisdiction under the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Title 18 U.S.C. § 922(g)(1) and § 921(a)(20) are relevant to this proceeding and are set forth in relevant part below:

(18 U.S.C. § 922(g)(1))

(g) It shall be unlawful for any person —

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . .

. . . to . . . possess in or affecting commerce, any firearm . . .

(18 U.S.C. § 921(20))

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include —

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

STATEMENT OF THE CASE

On June 2, 1998, the Appellant, Gary Sherwood Small, purchased a handgun from a firearms dealer known as the Delmont Sport Shop. Mr. Small filled out the ATF form with his actual name and address, and answered "no" to the question had he ever been convicted of a crime punishable by a term exceeding one year in prison.

Apparently, however, while Mr. Small had never been convicted of a single crime in the United States, he had been convicted of an offense which carries a penalty of more than one year in prison in Okinawa, Japan in 1994.

Alleging the Japanese conviction as the predicate felony, Mr. Small, the Petitioner herein, was indicted for violating 18 U.S.C. § 922(g)(1).

The Petitioner, Gary Sherwood Small, filed a motion to dismiss the indictment, arguing that the indictment should be dismissed because: 1) foreign convictions do not qualify as predicate prior convictions under 18 U.S.C. § 922(g); and, alternatively, 2) even if there is no flat prohibition against the use of foreign convictions, this particular conviction was not sufficiently fundamentally fair to be counted.[1]

The district court dismissed Petitioner's motion. (Appendix B). The Petitioner entered a conditional plea of guilty and proceeded with his appeal to the Court of Appeals, which affirmed the lower court and thereafter denied rehearing. This Petition for a Writ of Certiorari followed.

For the purposes of this issue, Petitioner believes that the fact that the predicate conviction was obtained in a Japanese Court is alone sufficient for this Court to resolve the issue. Thus, a more detailed factual discussion is not included.

---

1. Although the issue of the fundamental fairness of the Japanese conviction is not specifically raised as a question in this petition, no right to a jury, no bail or appeal, no right to remain silent, no right to confront one's accuser, the lack of the right to an attorney fluent in English, being interrogated for 25 straight days without counsel, etc. – all of which and more was documented to have occurred here – support the idea that convictions in foreign courts should not count as predicate felonies in 922(g)(1) prosecutions.

REASONS FOR GRANTING THE PETITION

I. The Decision Below, Although Consistent With The Decisions Of The Fourth And Sixth Circuits, Is In Conflict With The Decisions Of The Tenth And Second Circuits. Consequently, This Court Should Grant The Writ To Resolve The Conflict Among The Circuit Courts Of Appeal And To Determine Whether The Term "Convicted In Any Court" In 18 U.S.C. § 922(g)(1) (Felon In Possession Of Firearms) Includes Convictions Entered In Foreign Courts.

The petition should be granted primarily to resolve a clear and growing conflict which exists among the five Circuit Courts of Appeal which have decided this issue and to avoid the continuation of this conflict as the remaining Circuits inevitably face this issue.

In addition to the existence of a clear conflict among the Circuits, the potential for great injustice and irrational and erratic law enforcement based on this conflict is very real.

And finally, although three Circuits have concluded that the term "convicted in any court" means any court in the world, the two Circuits – including the Second Circuit's most recent decision – which have concluded that "any court" means any *American* court, are clearly the more well-reasoned decisions.

The first Appeals Court to address this issue was the Sixth Circuit in *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986). Winson was charged with violating 18 U.S.C. § 922(h)(1), receipt of a firearm having been "convicted in any court of a crime. . . ." Winson had apparently been

convicted of counterfeiting in Argentina and fraud in Switzerland. The trial court dismissed the indictment, holding the meaning of the term "any court" was ambiguous, and the principle of lenity was controlling. Therefore, the Court held, only convictions from courts within the United States were applicable.

The Sixth Circuit reversed, however, concluding that "an examination of the legislative history of Title IV reveals no discussion of the actual meaning of the phrase 'in any court'." *Id.* at 757. Thereafter, the Court concluded, the term "any court" is not ambiguous, and the term "any court" means any court anywhere in the world. This was essentially the complete analysis of the Sixth Circuit.[2]

Three years later, in *United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989) the Fourth Circuit followed the holding of the *Winson, supra*, decision of the Sixth Circuit, and concluded, like *Winson*, that the "scant legislative history of 18 U.S.C. § 922 . . . offered no illumination as to Congress' intended meaning" *Atkins* at 96, and held that "'any' is hardly an ambiguous term being all-inclusive in nature." *Id.* at 96. With no further discussion or analysis, the Court in *Atkins* allowed Atkins' British conviction to serve as a predicate in his § 922 prosecution.

Although an occasional federal district court addressed the issue, (*see Bean v. United States*, 89 F. Supp.2d 828 (E.D. Texas, 2000) holding that foreign convictions do not count in § 922 prosecutions), the issue was not revisited by a federal Appeals Court until December, 2000, when the

---

2. The *Winson* court also discussed the predecessor statute to 18 U.S.C. § 922, – 18 U.S.C. App. § 1202.

Tenth Circuit addressed the issue in *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000). The *Concha* court held that the term "convicted in any court" was intended to mean only courts in the United States.

In *Concha*, *supra*, the Court referred to the definition of the term "crime punishable by imprisonment for a term exceeding one year" in reaching its conclusion, a point overlooked by the Courts in *Winson* and *Atkins*.

The term "crime punishable by imprisonment for a term exceeding one year" does not include –

> (A) any *Federal or State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any *State* offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. § 921(20) (emphasis added).

The *Concha* court explains why this language when read *in pari materia* with the term "in any court", precludes the possibility that foreign convictions were intended to be included:

> This definition [18 U.S.C. § 921(20)] excludes certain federal and state crimes from § 922(g)(1), but makes no comparable mention of foreign crimes. If § 922(g)(1) were meant to cover foreign crimes, we would be left with the anomalous

> situation that fewer domestic crimes would be covered than would be foreign crimes. For example, while someone who had been convicted of a U.S. antitrust violation would be allowed to possess a firearm, someone convicted of a British antitrust violation would not be allowed to possess a firearm. There is no reason to believe that Congress intended this peculiar result in § 922(g)(1).

Thus, the definition of "crime punishable by imprisonment for a term exceeding one year" provides some evidence that Congress intended § 922(g)(1) to cover only federal and state crimes. Therefore, when the Armed Career Criminal Act requires "three previous convictions by any court referred to in section 922(g)(1)," it would exclude foreign convictions. (*Concha* at 1254).

As the *Concha* court observes, it would make no sense that Congress intended to give someone less protection when his conviction was obtained in Iraq, Afghanistan or some foreign jurisdiction as opposed to a court in the United States. Can it be that Congress intended a person convicted of an unfair trade practice in a foreign country (perhaps selling a bible in Afghanistan and convicted by a Taliban Court) to be prohibited from possessing a firearm in the United States, but a person convicted of an unfair trade practice in the United States to have no such prohibition?

As the Court in *Concha*, at 1254, held, "there is no reason to believe that Congress intended this peculiar result in § 922(g)(1)."

And even if this Court is not convinced that Congress intended the term "any court" to mean any state or federal court, clearly the ambiguity raised by the definition in § 921(20) when read ***in*** *pari materia* with § 922(g)(1), brings the rule of lenity in play in favor of the appellant. *Rewis v. United States*, 401 U.S. 808 (1971).

Although not specifically referred to by the *Concha* court, Petitioner calls this Court's attention to two other relevant sections of the Federal Firearms Statute, 18 U.S.C. § 922(g)(9) and the definition found in 18 U.S.C. § 921(33)(A).

Section 922(g)(9) reads as follows:

> (§ 922(a)) It shall be unlawful –
>
> (1) for any person –
>
> > (g)(9) who has been convicted in any court of a misdemeanor crime of domestic violence.
>
> to possess . . . a firearm.

The definition section, § 921(33)(A) reads in relevant part as follows:

> (33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –
>
> (i) is a misdemeanor under *Federal or State* law; and . . . . [Emphasis Added]

Again, we are faced with the anomalous situation that if the Third Circuit's decision is correct, an individual convicted of a misdemeanor crime of domestic violence in a foreign country can possess a firearm in the United States, but an individual convicted of an unfair trade practice in that same country cannot possess a firearm in the United States.

Clearly, that result would be absurd, and legislation passed by Congress cannot be read to intend an absurd result.

It is clear that the term "convicted in any court" in § 922(g)(9) (the misdemeanor of domestic violence offense) means any court in the United States in that to qualify as a "misdemeanor crime of domestic violence", the offense must be "a misdemeanor under Federal or State law;" (18 U.S.C. § 921(33)(A)(i)). By virtue of the fact that only a federal or state court can convict someone of a federal or state crime, "any court" necessarily means any American court.

It seems impossible that Congress could have intended the definition of "convicted in any court" found in § 922(g)(1) to mean any court in the world, but have intended the same term – "convicted in any court" found in § 922(g)(9) to mean any court in the United States.[3]

---

3. The March 3, 1997 issue of the French Journal "Liberation" published "the commandment of the good and interdiction of evil" which was signed into law on the 16th of December 1996 by the then Taliban government of Afghanistan. This law made it a serious crime, among other things, for anyone to fly or even possess a kite, for a man to shave or even trim his beard, or to possess photographs. Could it be that an individual convicted of one of these offenses, perhaps an American traveling through Afghanistan prior to the fall of the regime, would be committing a felony to possess a firearm in the United States? The government argues that the answer is yes.

The next Appeals Court to deal with this issue was the Third Circuit, the Court below in the instant matter. While the Third Circuit in the instant matter (*United States v. Small*, 333 F.3d 425 (3d Cir. 2003) followed *Winson* and *Atkins* in holding that the term "any court" means any court in the world, it did so with virtually no analysis or discussion whatsoever.

In fact, the lower court spent most of its time dealing with the due process issue and only discussed the use of foreign convictions as a predicate conviction in a footnote. In *United States v. Small, supra*, 427, n2, the Court wrote:

> FN2. The parties spent a great deal of their briefs arguing about the definition of § 922's "any court." We view this, however, as a tempest in a teapot, and for the reasons set forth in *United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989) (recognizing an English conviction for a crime punishable by imprisonment for a term exceeding one year as a proper predicate for conviction under § 922), and *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986) (recognizing Swiss and Argentine convictions for crimes punishable for terms exceeding one year as proper predicates for a conviction under § 922), foreign convictions, generally, can count as predicate offenses for the purposes of § 922. *But see United States v. Concha*, 233 F.3d 1249 (19th Cir. 2000) (holding that foreign convictions may not be used as predicate offenses under § 922 and 18 U.S.C. § 924).

To dismiss this issue, as the lower court did, by simply calling it a "tempest in a teapot" but acknowledging thereafter a split among the circuits and citing to *United States v. Concha, supra*, does little to resolve the conflict.

Consequently, when the lower court in this matter decided *Small* on June 23, 2003, three circuits had concluded the term "any court" meant any court in the United States.

On August 27, 2003, however, the Second Circuit decided the case of *United States v. Gayle*, 342 F.2d 89 (2d Cir. 2003) and joined the Tenth Circuit in holding that "convicted in any court" meant any court in the United States. The *Gayle* court agreed with the Tenth Circuit in *Concha* that by "looking to the statutory scheme as a whole," *Gayle*, at 93, and by "appreciating how sections relate to one another," *Gayle*, at 93, the more logical conclusion is that "a conviction in any court" means a conviction in any court in the United States. In reaching this conclusion, the *Gayle* court, at 93, wrote:

> Like the Tenth Circuit, we do not understand the logic whereby a person convicted of an antitrust violation in a foreign country would not be allowed to possess a firearm, yet a person convicted of the same antitrust violation in the United States would be allowed to possess a firearm. *Id.* At the very least, § 921(a)(20) injects doubt as to whether Congress intended foreign convictions to serve as predicate offenses.

In this part of its opinion, the *Gayle* court, like the court in *Concha*, recognized that it is not enough to simply look at the words "in any court" in a vacuum. To properly analyze

the question, one must look to the entire phrase "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." In that the definition of "crime punishable by imprisonment for a term exceeding one year" clearly implies American convictions, it is logical that the term "any court" – which is part of the overall phrase – means any American court. This is what Judge Katzmann meant in *Gayle*, *Id.* at 93, when he talked about "looking at the statutory scheme as a whole" and "appreciating how sections relate to one another."

Further, and unlike all of the other circuit courts that have addressed this issue, the Second Circuit was also able to find legislative history to help resolve this ambiguity. By finding and referring to both the Senate Judiciary Committee Report on the Gun Control Act and the Conference Report, Judge Katzmann writing for a unanimous panel, concluded that these reports "strongly suggest that Congress did not intend foreign convictions to serve as predicate offenses under the felon-in-possession statute." *Id.* at 94. After reviewing the Committee Report's discussion of the definition of the term "felony", the *Gayle* Court wrote that:

> The Senate Report thus unmistakably contemplated felonies, for the purposes of the Gun Control Act, to include only convictions in federal and state courts. *Id.* at 94.

With all due respect to the Third, Fourth and Sixth Circuits, the analysis of the Tenth Circuit in *Concha* and the Second Circuit in *Gayle* is more thorough and convincing than the attention paid to this issue by the other Courts of Appeal.

Regardless, however, of which way this growing conflict is resolved, a resolution is clearly necessary. As the law currently stands, taking into account this conflict among the circuits, a New Yorker, who had been convicted of a crime in a foreign country, could purchase a firearm in New York and fill out the form required by § 922(a)(6), § 922(s)(1)(A)(i)(I) and § 922(s)(3)(B)(i). In this required statement, the New York purchaser would be lawfully answering "*no*" to the question "Have you ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?". He would perhaps be properly and correctly advised by the licensed New York firearms dealer that "any court" means any court in the United States. Thereafter he and his buddies cross the border into Pennsylvania to go deer hunting where he is arrested for violating § 922(g)(1), possessing a firearm having been convicted in any court of a felony.

This individual, despite having legally purchased the rifle in the Second Circuit having been lawfully advised of the law, committed a serious crime by possessing the firearm in Pennsylvania – the Third Circuit. One million hunters are in the woods in Pennsylvania on opening day of hunting season, and a like number are in the woods in New York. And, thousands of hunters who share the long border between these two states, cross back and forth to enjoy the hunting seasons in both states, and both circuits. This same scenario and others not described here can be and is played out throughout this country.

The clear need to resolve this conflict is evident in that individuals absolutely desirous of obeying the law can commit serious crimes in this regard while being in total good faith and with no reasonable way of knowing that their conduct is illegal.

And what advice does one give the purchasers and sellers of firearms in the remaining circuits where this issue has yet to be decided? A uniform definition of the term "convicted in any court" is necessary and can be decided only by this Court.

Consequently, to resolve this conflict, to avoid erratic and sometimes irrational application of the law, and to eliminate the guessing game that currently exists among sellers and purchasers of firearms, this Honorable Court should grant certiorari in this matter.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 23, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2785

UNITED STATES OF AMERICA

v.

GARY SHERWOOD SMALL,

Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 00-cr-00160)
District Judge: Robert J. Cindrich

Argued: March 11, 2003

BEFORE: RENDELL, AMBRO and MAGILL,*
Circuit Judges

OPINION OF THE COURT

MAGILL, *Senior Circuit Judge.*

On March 14, 2002, defendant-appellant Gary Sherwood Small entered a conditional guilty plea to possessing a firearm

* Honorable Frank Magill, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

in violation of 18 U.S.C. § 922(g)(1) (2000). The district court sentenced Small to eight months' imprisonment followed by three years' supervised release, but allowed Small to remain on bail pending this appeal from the denial of Small's motion to dismiss. For the following reasons, we affirm.

I.

On April 14, 1994, the Naha District Court, in Naha, Japan, convicted Small for violations of the Japanese Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act, all of which were offenses punishable by a term of imprisonment exceeding one year.[1] On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned an indictment against Small, charging him with, *inter alia*, possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Small filed a motion to dismiss the indictment, which the district court denied. Subsequently, Small conditionally pled guilty to the § 922(g)(1) violation, pending the outcome of this appeal.

II.

Section 922(g)(1) generally provides that "[i]t shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to ship or transport or possess or receive a firearm

1. The government maintains that Small was sentenced to five years' imprisonment and paroled on November 22, 1996. His parole term ended on May 26, 1998.

or ammunition in interstate or foreign commerce or affecting interstate commerce. 18 U.S.C. § 922(g)(1). Small was convicted of crimes punishable by imprisonment for a term exceeding one year in Japan. Subsequently, he possessed a firearm in the United States. The dispositive question on appeal is whether the district court correctly recognized the judgment of the Japanese court for the purpose of Small's § 922(g)(1) conviction.[2]

This is an issue of first impression in this court. Small makes two main arguments with regard to this issue: (1) the district court incorrectly held that the Japanese conviction was fundamentally fair by failing to look at the totality of the circumstances, and (2) the district court should have held an evidentiary hearing to determine whether the Japanese conviction was fundamentally fair. We disagree.

2. The parties spent a great deal of their briefs arguing about the definition of § 922's "any court." We view this, however, as a tempest in a teapot, and for the reasons set forth in *United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989) (recognizing an English conviction for a crime punishable by imprisonment for a term exceeding one year as a proper predicate for conviction under § 922), and *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986) (recognizing Swiss and Argentine convictions for crimes punishable for terms exceeding one year as proper predicates for a conviction under § 922), foreign convictions, generally, can count as predicate offenses for the purposes of § 922. *But see United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000) (holding that foreign convictions may not be used as predicate offenses under § 922 and 18 U.S.C. § 924).

Appendix A

A.

First, our review of questions of law is plenary. *United States v. Singletary*, 268 F.3d 196, 198 (3d Cir. 2001). The district court correctly held that, prior to using the foreign conviction as a § 922 predicate offense, the court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness as required by the Due Process Clause. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. b (1987) (providing, in part, that "[a] court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered"). In other words, the district court correctly rejected the government's argument that any conviction, no matter how unfair, offensive, or absurd, can be a predicate offense for a § 922 conviction.

The government contends that *Lewis v. United States*, 445 U.S. 55 (1980) (holding that a state court felony conviction could be used as a predicate offense under 18 U.S.C. § 1202, even though it could be challenged in a collateral attack because the defendant was without counsel), and *Custis v. United States*, 511 U.S. 485 (1994) (holding that prior convictions are not subject to collateral attack at sentencing proceedings, except convictions obtained in violation of the right to counsel), control the issue. The distinctions between the case at bar and *Lewis* and *Custis* are clear; they include (1) that *Lewis* involved 18 U.S.C. § 1202, not § 922; (2) that *Custis* involved an attempted collateral attack on a prior conviction to avoid a sentencing

Appendix A

enhancement, not an evaluation of a prior conviction as an element of a criminal offense; and (3) most importantly, *Lewis* and *Custis* involved U.S. convictions governed by the U.S. Constitution as the predicate offenses, not foreign convictions, which raise specific due process concerns.

In order to ensure that the use of foreign convictions as predicate offenses for § 922(g)(1) convictions comports with our notions of fundamental fairness required by the U.S. Constitution, some procedural safeguards are necessary. We adopt the approach of the Restatement (Third) of Foreign Relations Law of the United States § 482, which provides two mandatory and six discretionary grounds for non-recognition of foreign judgments:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
>
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
>
> (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.
>
> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
>
> (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Restatement (Third) of Foreign Relations Law of the United States § 482.

In this case, the district court explicitly determined that the Japanese conviction comported with our concepts of fundamental fairness by examining the Japanese trial record and transcript. The district court's analysis satisfies us that, applying the standards adopted above, there were no grounds for non- recognition of the Japanese conviction as the predicate offense to Small's § 922(g)(1) conviction.

B.

Second, we review a district court's refusal to hold an evidentiary hearing to determine whether a foreign conviction meets one of the grounds for non-recognition for abuse of discretion. *See* Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. b (stating that "[t]he recognizing court may make [a] determination [of fundamental fairness of the foreign judicial system] without formal proof or argument, on the basis of general knowledge and judicial notice. A court may make an explicit finding that the judicial system meets the essential requirements of fairness, but such a finding may be inferred from a decision to recognize or enforce the foreign judgment, or to deny recognition on some other specific ground."); *see also*, *e.g.*, *United States v. Davis*, 174 F.3d 941, 947 (8th Cir. 1999); *United States v. Grant*, 114 F.3d 323, 326 (1st Cir. 1997). Here, the district court did not abuse its discretion by refusing to hold an evidentiary hearing.

III.

Accordingly, we AFFIRM the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 16, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 00-160

UNITED STATES OF AMERICA,

v.

GARY SHERWOOD SMALL

MEMORANDUM ORDER

Pending before the court is defendant's Motion To Dismiss Indictment (Doc. No. 14) and the government's Motion For A Preliminary Determination As To The Scope Of The Proceedings On The Defendant's Motion To Dismiss And For The Denial Of The Motion Without An Evidentiary Hearing (Doc. No. 38).

I. *Background*

On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned a four-count indictment against defendant Gary Sherwood Small ("Small") charging him at Count One with Making a False Statement to a Federally Licensed Firearms Dealer in violation of 18 U.S.C.

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Section 922(a)(6)[1]; at Counts Two and Three with Possession of a Firearm by a convicted Felon in violation 18 U.S.C. Section 922(g)(1)[2]; and at Count Four with Possession of Ammunition by a Convicted Felon in violation of 18 U.S.C. Section 922(g)(1). The indictment indicates that Small had been previously convicted on April 12, 1994 in Naha, Japan District Court for certain violations of the Japanese Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act, all of which were offenses punishable by a term of imprisonment

1. Section 922(a)(6) provides that:

> It shall be unlawful—for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a . . . licensed dealer . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. Section 922(a)(6).

2. Section 922(g)(1) provides that:

> It shall be unlawful for any person—***who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year*** . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. Section 922(g)(1) (emphasis added).

exceeding one year.[3] The government contends that Small violated Section 922(a)(6) in June 1998 when he purchased a firearm from a licensed firearms dealer and falsely represented to the dealer that he had never been convicted of an offense punishable by a term of imprisonment exceeding one year. The government further contends that Small violated Section 922(g)(1) in June 1998 and April 1999 when he knowingly possessed certain firearms and ammunition subsequent to his Japanese conviction.

II. *Analysis*

Small filed the instant motion to dismiss arguing that the Japanese conviction should not be considered as a qualifying prior conviction under Section 922 because foreign convictions are not covered by the statute. More specifically, Small contends that Section 922's language "any court" refers to courts in the United States only. Small argues in the alternative that even if foreign convictions are deemed to be covered by Section 922, the Japanese conviction should not qualify as a predicate offense because it failed to meet certain fundamental protections guaranteed by the United States Constitution. He maintains that an evidentiary hearing should be scheduled to give him an opportunity to present testimony and other evidence on the fairness of the Japanese conviction.

The government filed its motion for a preliminary determination as to the scope of the proceedings arguing that the indictment is valid regardless of the fairness of the

3. The government maintains that Small was sentenced to a term of imprisonment of five years and was paroled on November 22, 1996. His parole term was terminated on May 26, 1998.

underlying Japanese conviction because Section 922 focuses not on the reliability of a prior conviction, but on the fact of a prior conviction. The government argues in the alternative that the record of the Japanese criminal trial demonstrates the fairness of Small's criminal trial and obviates the need for an evidentiary hearing.

A. *Foreign Convictions Under Section 922*

We address first Small's argument that no foreign conviction should qualify as a predicate offense under Section 922. Only three Courts of Appeals, not including our own, have addressed the issue of whether Section 922's language "any court" includes foreign convictions. The Courts of Appeals for both the Fourth and Sixth Circuits have held that under a plain reading of the term "any court," foreign convictions are covered by the statute. *See United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989) (English conviction was proper predicate conviction under Section 922); *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986) (Argentine and Swiss convictions were proper predicate convictions under Section 922).

In *Winson*, the Sixth Circuit Court of Appeals reversed a district court ruling that Section 922's language was ambiguous because the language in 18 U.S.C. Section 1202,[4]

4. Section 1202 provided in relevant part:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a

(Cont'd)

a statute similar to Section 922, expressly applied only to convictions by a court of the United States or of a State or any political subdivision thereof. 793 F.2d at 756. In light of the perceived ambiguity, the district court applied the rule of lenity[5] and found that the phrase "any court" did not include foreign courts.

The Court of Appeals reversed, explaining that "[i]n essence, the trial judge urges that we view the patently unambiguous language in section 922 as rendered latently so by the co-existence of the expressly different and more limiting language in section 1202." *Id.* at 757. The Court noted that the Supreme Court had "found a congressional intent to give each statute an independent construction and application, especially where, as here, the express language of the two [statutes] indicates different meanings." *Id.* The Court further noted that "[t]he power of Congress to legislate in this area is unquestioned. Therefore, 'resolution of the

(Cont'd)

> felony, . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Winson, 793 F.2d at 756 n. 3 (quoting 18 U.S.C. Section 1202). Section 1202 was enacted as part of the 1968 Omnibus Crimes Control and Safe Streets Act, and is no longer in effect.

5. The rule of lenity provides that an "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Winson*, 793 F.2d at 756 (quoting *Rewis v. United States*, 401 U.S. 808 (1971)).

pros and cons of whether a statute should sweep broadly or narrowly is for Congress.'" *Id.* (citing *United States v. Rodgers*, 466 U.S. 475 (1984)). Indeed, the use of more limiting language in Section 1202 versus Section 922's broader language evinces Congress's attention to each statute's reach. The Court held, therefore, that the language "any court" in Section 922 was unambiguous and included foreign courts. *Id.*

The Court also found that Section 922 was neither inequitable on its face nor in its application to the case before it, if foreign convictions were treated as predicate offenses under the statute. *Id.* The Court explained:

> Since the object of the statute is to prevent the possession of firearms by individuals with serious criminal records, we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States. Moreover, we do not perceive any congressional intent to exclude from the Act's coverage a class of felon whose unlawful conduct occurred outside this country.

Id. at 758. As to the particular foreign convictions at issue before it, the Court recognized that the defendant had not identified how such convictions were the result of violations of his civil rights or contrary to any cherished principal of American constitutional law. *Id.*

Agreeing with the logic employed in *Winson*, the Court of Appeals for the Fourth Circuit held in *Atkins* that an English conviction qualified as a predicate offense under Section 922. *Atkins*, 872 F.2d at 96. The Court observed that "considering the plain meaning of the subject language, Atkin's conviction appears to satisfy the requirements of the statute. 'Any' is hardly an ambiguous term, being all-inclusive in nature." *Id.* The Court also noted that like the defendant in *Winson*, Atkin had not identified how his English conviction was contrary to any cherished principle of American constitutional law. *Id.*

Contrary to the views of the Sixth and Fourth Circuits, the Court of Appeals for the Tenth Circuit recently held in *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000) that foreign convictions were not covered by Section 922. In that case the defendant, Concha, had been convicted of being a felon in possession of a firearm in violation of Section 922(g)(1). The government sought to enhance Concha's sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. Section 924(e), which provides that a person who violates Section 922(g) shall have his sentence enhanced if he "has three previous convictions by any court referred to in section 922(g)(1). . . ." 18 U.S.C. Section 924(e)(1). The government introduced four previous violent felony convictions, three of which took place in England.

Applying reasoning similar to that which was rejected by the Sixth Circuit Court of Appeals in *Winson*, the Tenth Circuit concluded that the patently unambiguous language in Section 922 was rendered latently ambiguous by the co-existence of the definition of the term "crime punishable

by imprisonment for a term exceeding one year" appearing at 18 U.S.C. Section 921(20). Section 921 is the general statutory definitions section that applies to Section 922. Section 921(20) provides in pertinent part:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. Section 921(20). The Court noted that the definition at Section 921(20) excludes certain federal and state crimes from Section 922(g)(1), but makes no comparable mention of foreign crimes. *Concha*, 233 F.3d at 1254. The Court observed, therefore, that "[i]f Section 922(g)(1) were meant to cover foreign crimes, we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes." *Id.* Based on this peculiar result and certain public policy reasons, the Court found that "contrary to the Fourth and Sixth Circuits, we believe that the statute is ambiguous." *Id.* at 1256. Faced with what it deemed an ambiguity, the Court applied the rule of lenity and held that foreign convictions could not be used as predicate offenses for sentencing enhancement under Section 924(e). *Id.*

In short, we agree with the findings of the Fourth and Sixth Circuit Courts of Appeals that the phrase "any court" in Section 922 is not ambiguous and includes foreign courts.[6] Accordingly, the rule of lenity is not applicable. *See Atkins*, 872 F.2d at 96 ("If statutory language is unambiguous, the principle of lenity is inapplicable." (citing *United States v. Turkette*, 452 U.S. 576, 587-88 n.10 (1981))). "Any" court means any court and there is nothing in the plain and unambiguous language of Section 922 indicating that Congress intended to exclude foreign convictions from such a broad term.

B. *Qualifying Foreign Convictions*

Having found that foreign convictions can qualify as predicate offenses under Section 922, we next address the government's argument concerning which foreign convictions qualify. Citing *Custis v. United States*, 511 U.S. 485 (1994), the government argues that all foreign

6. In *Concha*, Judge Baldock dissented, noting his agreement with the Courts of Appeals for the Fourth and Sixth Circuits. *Concha*, 233 F.3d at 1256. Citing *Atkins* and *Winson*, Judge Baldock stated:

> Absolutely nothing in the plain and unambiguous language of Section 924(e)(1) indicates that Congress intended to exclude from the statute's coverage a dangerous felon whose unlawful conduct occurred outside the United States. . . . Reasons why Congress could have excluded such a felon from Section 924(e)(1)'s coverage (but did not) do not justify altering the statute's plain language by judicial fiat.

Id.

convictions punishable by a term of imprisonment exceeding one year qualify regardless of the fairness of such convictions because Section 922 focuses not on the reliability of a prior conviction, but on the fact of a prior conviction.

In *Custis*, the defendant was convicted of violating Section 922(g)(1). Because he had three prior state felony convictions, the district court enhanced his sentence pursuant to Section 924(e)(1). The defendant appealed, arguing that the enhancement was not proper because two of the three prior convictions were constitutionally invalid. More specifically, the defendant maintained that he was denied effective assistance of counsel in connection with those convictions; that his guilty plea was not knowing and intelligent; and that he was not adequately advised of his rights to opt for a "stipulated facts" trial. 511 U.S. at 496.

The Supreme Court observed that Section 924(e)(1) "focuses on the fact of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." 511 U.S. at 490-91 (emphasis in original). The Court concluded, therefore, that a defendant in a federal sentencing proceeding had no right to collaterally attack the validity of previous state convictions used to enhance his sentence under Section 924(e)(1). The Court recognized one exception, however, convictions where there was a failure to appoint counsel at all. The Court referred to its prior decision in *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), wherein the Court held:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance

> of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.

The Court concluded, therefore, that there was "a historical basis in [its] jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of [its] oft-stated view that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Custis*, 511 U.S. at 494-95 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

The Court also found that the ease of administration and the interest in promoting the finality of judgments provided additional support for its holding. As to the ease of administration, the Court commented:

> [F]ailure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary,

> would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.

Id.

As to finality, the Court stated that " '[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Id.* at 497 (citation omitted). Moreover,

> [b]y challenging the previous conviction, the defendant is asking a district court 'to deprive [the] [state-court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgemen[t].' These principles bear extra weight in cases in which the prior convictions, such as the ones challenged by Custis, are based on guilty pleas.

Id. (citation omitted). The Court ultimately held that the defendant could not attack the prior convictions because "[n]one of [the] alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Id.* at 496.

We disagree with the government's interpretation of *Custis*. *Custis* does not qualify all foreign convictions,

regardless of the fairness of such convictions, as Section 922 predicate offenses. First, at least one exception to the wholesale acceptance of foreign convictions must be implied from *Custis*—foreign convictions where there has been a failure to appoint counsel at all. Otherwise, a foreign conviction where there has been a failure to appoint counsel at all would qualify even though a corresponding conviction in the United States would not.

Also, there is an important distinction between the instant case and *Custis*. *Custis*, as opposed to the Japanese conviction at issue here, involved convictions governed by the United States Constitution which guarantees certain rights to ensure fundamental fairness in criminal prosecutions. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). This concept of fundamental fairness forms the foundation of our judicial system and lies at the heart of our democracy. It is not surprising, therefore, that prior to *Custis* the vast majority of courts had understood the term "conviction" in the ACCA to mean "lawful conviction" and given defendants an opportunity to show that a prior conviction offered for enhancement was unconstitutionally obtained. *See Custis*, 511 U.S. at 498 (Souter, J., dissenting). As Justice Souter explains in his dissent in *Custis*, the Court's prior decisions in *United States v. Tucker*, 404 U.S. 443 (1972) and *Burgett v. Texas*, 389 U.S. 109 (1967) in particular "are easily (if not best) read as announcing the broader principle that a sentence may not be enhanced by a conviction the defendant can show was obtained in violation of any specific federal right . . . because to do so would be to allow the underlying right to be denied anew and to suffer serious erosion." *Custis*, 511 U.S. at 505-06 (Souter, J., dissenting) (citations omitted).

Despite Congress's failure to ever express legislative disagreement with such precedent, the *Custis* majority essentially eliminated constitutional challenges to prior United States convictions at sentencing based on a tortured application of the rules of statutory interpretation and relevant case law. *See Custis*, 511 U.S. at 500-01 (Souter, J., dissenting).

One could argue that the majority's ruling was reasonable, given that the convictions at issue in *Custis* were obtained in a United States state court where one can generally assume the concepts of fundamental fairness prevailed. The same cannot be said, however, in the context of a foreign conviction.[7] Given the uncertainty surrounding foreign convictions, a defendant should have an opportunity to challenge those convictions which were obtained in such a manner as to raise serious doubts about the credibility of

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7. *See Bean v. United States*, 89 F.Supp.2d 828, 838 n.8 (E.D. Tex. 2000):

> [P]rocedural due process concerns are automatically raised with the use of foreign criminal convictions. The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials.

(quoting Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status* ("Kimes"), 35 Colum J. Transnat'l L. 503, 518-21 (1997)).

the fact-finding process and, thus, to render it fundamentally unfair. Moreover, a defendant should not be limited in such challenges to a failure to appoint counsel claim.[8] Otherwise, as Small points out, a felony conviction by a Taliban "Court" in Afghanistan, where convictions can apparently begin and end with a mere accusation, would qualify.[9]

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8. The majority was careful to point out that its ruling only applied to constitutional challenges at sentencing and that the defendant could still pursue his challenge via federal habeas corpus review. *See Custis*, 511 U.S. at 497. This observation highlights another important distinction between the two cases. In *Custis*, the prior convictions triggered a sentencing enhancement, whereas the Japanese conviction at issue here constitutes an element of the offense. Thus, there was no doubt that the defendant in *Custis* was guilty of a serious offense and would be punished. The prior convictions were only relevant as to how much punishment. Here, however, the fact of guilt or innocence hinges upon the prior conviction. Thus, the opportunity to raise a constitutional challenge early on in the proceedings, as opposed to waiting for a protracted habeas corpus review, is of much greater importance here than in *Custis*.

9. The criminal conduct underlying a foreign conviction may also be an issue, given the differing views among foreign nations as to what constitutes illegal conduct. *See Bean*, 89 F.Supp.2d at 838 n.8:

> In practice, the use of foreign convictions . . . contravenes the principle that defendants should be treated equally. Because some countries display a much more punitive policy than others by criminalizing more behaviors and prosecuting violations of the law more aggressively, the use of foreign convictions . . . invites arbitrary distinctions in punishment simply based on

(Cont'd)

We note that permitting such challenges to foreign convictions would not unduly infringe upon the ease of administration or the interest in the finality of judgments. As to the ease of administration, we recognize the government's position that foreign court transcripts and records may sometimes be nonexistent or difficult to obtain. It is the defendant's burden, however, to establish that a prior foreign conviction was fundamentally unfair. *See Custis*, 511 U.S. at 511 ("[N]o one disagrees that the burden of showing the invalidity of prior convictions would rest on the defendants." (Souter, J., dissenting)) Thus, the defendant, not the court, will be faced with this potentially difficult task. *Id.* ("It would not be sentencing courts that would have to

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(Cont'd)

> whether a defendant happens to have committed a prior crime in a country with strict, rather than lenient, policies. Despite the same actual conduct, different defendants could be prosecuted for very different 'crimes' (or not prosecuted at all) depending solely on the punitive attitude of the country in which the conduct was committed.... It is within each country's power to determine what punishment to prescribe for crimes committed within its borders, but the fact that different countries do decide to prosecute very different crimes and impose very different punishments compounds the difficulty of using foreign convictions. . . .

(quoting Kimes, 35 Colum J. Transnat'l L. at 518-21). For example, should a felony conviction by a Taliban court in Afghanistan for possessing a bible or for a female not completely covering every inch of her body qualify? We think not. We need not answer this question here, however, as Small's Japanese conviction involved the smuggling of firearms and ammunition, conduct that most certainly constitutes a serious felony offense in the United States.

[rummage through transcripts or record], however, but defendants seeking to avoid enhancement. . . ." (Souter, J., dissenting)). Moreover, 21 U.S.C. Section 851(c)(2) expressly permits defendants in drug cases to challenge prior convictions used for sentencing enhancement purposes which were "obtained in violation of the Constitution of the United States. . . ." Federal courts have entertained such challenges for more than thirty years. *See Custis*, 511 U.S. at 511 (Souter, J., dissenting). As to the interest in promoting the finality of judgments, such interest is significantly diminished in the context of foreign convictions.[10]

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10. The government contends that if we were to find that all foreign felony convictions qualify as Section 922 predicate offenses regardless of the fairness of such convictions, individuals such as Small would not be left without a remedy. More specifically, the government contends that Section 925(c) of Title 18 provides a mechanism for a felon to obtain prospective relief from Section 922. Section 925(c) provides that a felon may petition the Secretary of the Treasury for the restoration of firearm privileges, which the Secretary may grant if the applicant shows that he is not likely to act in a manner dangerous to public safety and the granting of relief would not be contrary to the public interest. The government maintains, therefore, that Small could have sought relief pursuant to Section 925(c) before he decided to possess the firearms at issue in the Japanese conviction. The government fails to mention, however, that "Congress has prevented any funds from being used for this mechanism in the appropriations bills every year since 1992." *Concha*, 233 F.3d at 1255 n.3. Thus, several courts have held that the lack of congressional funding suspends any relief under Section 925(c). *Id.* Indeed, the government has vigorously argued the same in connection with a Section 925(c) petition that was recently before this judge.

Having found that Small should be allowed to raise a constitutional challenge to his Japanese conviction, we next consider what standard should apply to that challenge. The instant case is apparently one of first impression, as neither we nor the parties have uncovered any cases where a court, after having found that Section 922 covers foreign convictions, has entertained a constitutional challenge to any such conviction. As previously noted, however, Section 851(c) permits defendants in drug cases to challenge prior convictions that were "obtained in violation of the Constitution of the United States. . . ." 21 U.S.C. Section 851(c)(2). The case law dealing with Section 851(c) challenges, therefore, provides helpful guidance for our review of the constitutional challenge at issue here.

The Court of Appeals for the Third Circuit most recently addressed a Section 851(c) challenge in *United States v. Kole*, 164 F.3d 164 (3d Cir. 1998). In *Kole*, the government sought to enhance a defendant's drug sentence based on a previous drug conviction in the Philippines. The defendant argued that the Philippine conviction was obtained in violation of her rights under the United States Constitution because, among other things, she was denied effective assistance of counsel and a trial by jury. The court first considered the jury trial issue concluding at the outset that Section 851 was only intended to "ensure fundamental fairness by excluding any conviction that was obtained in a manner inconsistent with concepts of fundamental fairness and liberty endemic in the Due Process Clause of the Fifth Amendment of the United States Constitution." *Id.* at 171. Citing Supreme Court precedent dealing with the issue of which rights in the Bill

of Rights are protected against state action by the Fourteenth Amendment, the Court of Appeals noted that:

> "[t]he Bill of Rights is evidence, at various points, of the content Americans find in the term 'liberty' and of American standards of fundamental fairness." Thus, "'Due Process' expresses the requirement of 'fundamental fairness'" . . . "[A]pplying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

Id. (quoting *Duncan*, 391 U.S. at 177; *Lassiter v. Department of Soc. Serv. of Durham County, North Carolina*, 452 U.S. 18, 24 (1981)).

Of particular importance was the Court's review of *Duncan*, wherein the Supreme Court held that the concept of Due Process under the Fourteenth Amendment included the right to a jury trial for serious crimes. In *Duncan*, the Supreme Court noted that the test for determining whether a particular right is protected against state action by the Fourteenth Amendment has been phrased in a variety of ways. 391 U.S. at 149. The Court recognized, for example, that "[t]he question has been asked whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; whether it is basic in our system of jurisprudence; and whether it is a fundamental right, essential to a fair trial." The Court

observed that the following rights had already been deemed to be protected under this test, which we refer to henceforth as the fundamental fairness test:

> the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trial any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

Id. at 148.

The Court of Appeals noted that although the Supreme Court had added the right to a jury trial to this list in *Duncan* "as applied to the American legal system, it left no doubt that other societies may well be able to fashion a system with no juries that is fundamentally fair to the accused, thus comporting with our concept of due process." *Kole*, 164 F.3d at 172. The Court proceeded to review the rights of an accused under the Philippine legal system concluding that such system was consistent with the concept of fundamental fairness despite the absence of a right to trial by jury. *Id.* at 174. The Court then reviewed the Judge's opinion in the specific conviction at issue to determine whether the rights provided by the Philippine legal system were actually applied. The

Court noted that the Philippine Judge's "opinion reflects the kind of careful, searching analysis of evidence that one would expect from a trial judge in the United States. The fact that [the defendant] was denied a jury trial . . . in no way undermines her conviction there." *Id.* at 175.

The Court next considered the defendant's ineffective assistance of counsel claim. More specifically, the defendant argued that the use of the Philippine conviction violated her Sixth Amendment right to counsel because her trial attorney had an irreconcilable conflict of interest that prevented him from effectively representing her. *Id.* The Court noted that the defendant must "show some actual conflict of interest that adversely affected his counsel's performance in order to prevail." *Id.* After engaging in a detailed examination of the trial record, the Court concluded that the defendant had not satisfied her burden on the conflict issue.

In sum, the outcome of Small's constitutional challenge turns on the issue of whether the Japanese conviction comported with the concepts of fundamental fairness. As noted by the Court of Appeals in *Kole*, such determination is an uncertain enterprise which must be considered in the context of each case by first considering any relevant precedents and then by assessing any interests that are at stake. 164 F.3d at 171.

C. *Evidentiary Hearing*

The government argues that the availability of the trial record of the Japanese conviction obviates the need for an evidentiary hearing. We agree.

The government submitted a copy of the entire trial record of Small's Japanese criminal trial. *See* Record of the Japanese Trial ("Tr. Rec.") (Doc. No. 39). Small's counsel had ample opportunity to thoroughly review the record, and apparently did so based on the numerous detailed objections he makes to specific portions of it in his filings with the court. Although Small contends that he needs an evidentiary hearing to prove the unfairness of the conviction, he does not specify what he would present that is not already contained in the trial record or otherwise referred to in his briefs.[11] Thus, we fail to see what information Small could add to the case that is not already before the court. Accordingly, we agree with the government that an evidentiary hearing is not needed.

D. *Fundamental Fairness of Japanese Conviction*

Small argues that the Japanese conviction did not comport with the concepts of fundamental fairness because:

— he was denied the right to bail;

— he was interrogated for 25 consecutive days;

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11. Small does contend that he would present an expert witness at an evidentiary hearing on the Japanese criminal justice system. As we point out below, however, the deprivations of which Small claims are primarily directed at specific actions taken in his case, not the overall system of rights as stated in the Japanese constitution. More importantly, the relevant issue is what actually occurred in a particular case not what rights are purportedly provided. Thus, testimony by an expert on the Japanese legal system would not be particularly helpful in this case.

Appendix B

— he was denied the right to a speedy trial;

— one of the three judges who decided his case was substituted with a new judge during the trial;

— the trial transcript contains prejudicial hearsay;

— he was denied any appeal or appellate rights;

— the testimony by the prosecution's handwriting expert would not be admissible in an American court;

— he was denied the right to a jury trial;

— he was denied the right to remain silent;

— he was denied the right to confront his accusers; and

— he was denied the right to counsel or effective counsel at various crucial stages of the proceedings.

At the outset, we note that the Japanese Constitution contains many of the rights guaranteed by the United States Constitution. For example, the Japanese Constitution provides as follows:

> Article 31: No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Appendix B

* * *

Article 33: No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.

Article 34: No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Article 35: The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. 2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36: The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

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Article 37: In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. 2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense. 3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38: No person shall be compelled to testify against himself. 2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. 3) No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39: No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Government's Omnibus Response To Defendant's Pretrial Motions ("Gov's Resp.") (Doc. No. 28) Attach. 1, pp. 5-6. Thus, other than the absence of a right to a jury trial, the deprivations of which Small complains are directed at the specifics of his prosecution and not the overall system of rights as stated in the Japanese Constitution, which, not unsurprisingly in view of its origin, compare favorably with our own.

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1. Bail and Interrogation

Small argues that the Japanese conviction was unfair because he was denied bail and was interrogated for 25 consecutive days. Although such actions may not be allowed by our system of justice, no custodial statements by Small, if any, were used against him at his trial. Thus, we fail to see how these events rendered his conviction unfair.[12]

2. Speedy Trial and Judge Substitution, Hearsay, Appeal Rights

Small contends that his conviction was unfair because he was denied the right to a speedy trial; that one of the three judges who decided his case was substituted with a new judge during the trial; and that he was denied any right to appeal the conviction. Small does not explain, however, and we fail to see, how these occurrences resulted in an unfair conviction.

Our system does demand a "speedy trial", but even when that promise is breached, the defendant is seldom entitled to relief in the form of a dismissal absent a showing of prejudice caused by the delay. Small has not explained how he was prejudiced by any delay in the trial in terms of making it less likely that reliable evidence adduced there pointed to his guilt as the tribunal found.

In the United States, it is not uncommon nor unacceptable to substitute one finder of fact for another when the first is

12. Denial of bail pending trial, especially in cases involving weapons, drugs and/or violent behavior, has become a common feature of our own system of justice.

unable to serve for the duration of the trial. Of course, under our practice, the alternate juror must have been present for all of the testimony during the trial. Apparently, in Japan, the law permits one of the judicial fact-finders to be substituted with another. Inasmuch as we have a transcript of the proceeding available to us, we presume it was likewise available to the substitute judge and thus, that he was in a position to make a finding as to guilt based on all of the evidence presented. In the absence of any evidence to the contrary, we also presume that the substitute judge heard a sufficient portion of the trial to enable him to make the necessary credibility findings as to prosecution witnesses. We also note that the prosecution's evidence consisted almost entirely of physical and documentary evidence and expert testimony, the type of evidence in which credibility determinations often play little, if any, part. This was not a case which turned on eyewitness identification testimony, for example, where a determination of the witness's credibility would be crucial and observation of the witness's live testimony would be necessary to effectively make such determination. In any event, this is not so radical a departure from our own accepted procedures as to render the trial "fundamentally unfair".

Nor do we find the absence of a right to appeal grounds for a finding that the trial itself was fundamentally unfair. In the United States we value liberty so highly that the convicted person is entitled to direct review (sometimes at multiple levels) and may collaterally attack the conviction (sometimes in both state and federal courts). However, our law as to the appropriate level of direct review as well as the opportunity for collateral attack have changed from time to

time according to prevailing notions of what is just and proper, and in any event, are statutory, not Constitutional. We are not prepared to hold that another system, providing for less or even no appellate review, is fundamentally unfair on that ground alone.

3. *Hearsay*

Small argues that the trial transcript contains prejudicial hearsay. Despite having access to the trial transcript, Small only points to one instance of hearsay involving a reference to Small's alleged association with organized crime. Tr. Rec. Ex. 22 p. 11. Although it is not clear whether this testimony was inadmissible hearsay or subject to one of the many exceptions to the hearsay rule, a review of the trial transcript does not reveal the presence of inadmissible hearsay to such an extent that the trial was unfair. Moreover, Small's counsel had an opportunity to cross-examine witnesses on any hearsay testimony.

4. *Handwriting Expert*

Small argues that the Japanese conviction was unfair be because the testimony by the prosecution's handwriting expert would not have been admissible in an American court. We disagree.

Based on our review of the record, it appears that the handwriting expert's testimony was fairly introduced. First, the handwriting expert produced a written report which closely resembles a Fed. R. Civ. P. 26 report. The report contains, for example, a complete statement of all opinions

to be expressed and the basis and reasons therefor and the data or other information considered by the expert in forming his opinion. Tr. Rec. Ex. 6. Also, the methods used by the expert is similar and/or identical to those of handwriting experts which typically testify before this court. Moreover, Small's counsel was given full opportunity to, and did, cross-examine the expert. Tr. Rec. Ex. 20.

5. *Jury Trial*

Small argues that his trial was unfair because he was not given a jury trial. We disagree.

As the Court of Appeals recognized in *Kole*, other countries may well be able to develop a system with no juries that is fundamentally fair to a defendant. 164 F.3d at 172. Indeed, the Court in *Kole* found that the Philippine justice system, which provided only a bench trial, was fair. The Court noted:

> [c]learly, the legal system of the Philippines seeks to guard the individual against official tyranny and protect individual liberty. Congress could not have intended . . . to exclude criminal convictions obtained under such a system merely because that sovereign provides a method of protecting fundamental liberties that does not include the right to trial by jury.

Id. Just so here.

The Japanese system, like the Philippine system, seeks to guard the individual against official tyranny and protect individual liberty. Adherence to these ideals is evident by the thoroughness of the trial proceedings. The three judge panel in Small's case, for example, held several days of trial at which it received substantial testimonial and documentary evidence, all of which was subject to challenge and cross-examination by Small's counsel.

6. *Right to Remain Silent*

Small argues that his trial was unfair because he was denied the right to remain silent. More specifically, Small contends that he was called to testify by the prosecution and that counsel for the prosecution commented to the judges on Small's attitude in failing to answer questions and continued denial of the charges. Although such conduct would be highly improper in a criminal prosecution in the United States, we cannot say that the prosecutor's actions cast any serious doubt on the accuracy of the fact-finding process or rendered Small's conviction unfair. The questioning of Small and reference to his silence makes up a small portion of the prosecution's case. As the government accurately recites in its brief, the trial record indicates that the prosecution presented substantial evidence of Small's guilt. Government's Motion For Preliminary Determination (Doc. No. 38) pp. 11-12. Moreover, defense counsel, in response to the prosecution's conduct, proffered an equally plausible explanation to the panel for Small's attitude in consistently denying the charges—his innocence. Tr. Rec. Ex. 24.

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7. *Right to Confront Accusers*

Small contends that three witnesses testified by way of deposition and were not cross-examined by defense counsel. These three witnesses, all of whom were deposed in the United States, established that Small purchased the hot water heater in the United States and arranged for its shipment to Japan. Although such testimony would violate the confrontation clause of the United States Constitution, we agree with the government that the testimony of these witnesses was inconsequential. As the government points out, there was other evidence on the more significant point of whether Small shipped the hot water to Japan. For example, a handwriting expert concluded that it is "highly likely" that the same person wrote the name "Gary S. Small" and the address where Small was staying in Japan on the box that contained the water heater, the Customs Declaration Form, the shipment instructions, and an envelope that was addressed by Small and found on his person. Tr. Rec. Ex. 6. Small's name and address were also written on the box containing the hot water heater. Tr. Rec. Ex. 6. Finally, the handwriting expert testified that the same person wrote the declaration form, the shipping instructions, and the address on the box. Tr. Rec. Ex. 6. Also, Small attempted to claim the hot water heater in Japan and admitted that it was his. Tr. Rec. Ex. 18.

8. *Right to Counsel and Effective Counsel*

Small argues that he was denied effective assistance of counsel and was denied access to counsel during police interrogations.

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As the Court of Appeals explained in *Kole*, a defendant must show that his counsel's representation fell below an objective standard of reasonableness. 164 F.3d at 175. If the defendant is able to make such a showing, he must then establish that he was prejudiced by counsel's dereliction. *Id.* Small baldly asserts that his counsel was ineffective, but does not indicate what he should have done differently. Indeed, as the government correctly notes, the trial record demonstrates that Small's attorney cross-examined witnesses and presented cogent arguments despite the overwhelming evidence introduced by the prosecution. As to the availability of counsel during police interrogations, we note again that no custodial statements by Small, if any, were used against him at trial. Accordingly, we find that Small's conviction was not rendered unfair by ineffective assistance of counsel or the absence of counsel during police interrogation.

In sum, we find based on our review of the trial record that Small's Japanese conviction was sufficiently consistent with our concepts of fundamental fairness and that we may have confidence in the reliability of the fact-finding process which led to it.

In accordance with the foregoing, **IT IS HEREBY ORDERED** that:

— The defendant's Motion To Dismiss Indictment (Doc. No. 14) is **DENIED**;

— The government's Motion For A Preliminary Determination As To The Scope Of The Proceedings On The Defendant's Motion To

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Dismiss And For The Denial Of The Motion Without An Evidentiary Hearing (Doc. No. 38) is **GRANTED** and the court rules that an evidentiary hearing is unnecessary under the circumstances present here.

SO ORDERED this 16 day of January, 2002.

s/ Robert J. Cindrich
ROBERT J. CINDRICH
United States DIstrict Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 23, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2785

UNITED STATES OF AMERICA

v.

GARY SHERWOOD SMALL,

Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 00-cr-00160)
District Judge: Robert J. Cindrich

Argued: March 11, 2003

BEFORE: RENDELL, AMBRO and
MAGILL*, *Circuit Judges*

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and MAGILL*, *Circuit Judges*

---

* Honorable Frank Magill, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Appendix C

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT

s/ [illegible]
Circuit Judge

Dated: July 23, 2003

APPENDIX D — RELEVANT STATUTES

(18 U.S.C. § 922(g)(1))

(g) It shall be unlawful for any person —

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> . . . to . . . possess in or affecting commerce, any firearm . . .

(18 U.S.C. § 921(20))

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include —

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

No. 03-750

In the Supreme Court of the United States

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the phrase "convicted in any court" in the federal statute that prohibits felons from possessing firearms or ammunition, 18 U.S.C. 922(g)(1), includes convictions entered by the courts of foreign countries.

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In the Supreme Court of the United States

No. 03-750

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 333 F.3d 425. The district court's opinion (Pet. App. 8a-40a) is reported at 183 F. Supp. 2d 755.

JURISDICTION

The court of appeals entered its judgment on June 23, 2003. A petition for rehearing was denied on July 23, 2003 (Pet. App. 41a-42a). On October 15, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 20, 2003, and the petition was filed on November 17, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury returned a four-count indictment against petitioner that charged him with making a false statement that was intended or likely to deceive a licensed firearms dealer with respect to the sale of a firearm, in violation of 18 U.S.C. 922(a)(6); possessing an SWD Cobray pistol in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); possessing a Browning .380 caliber pistol in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); and possessing firearm ammunition in or affecting interstate commerce while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). Petitioner entered a conditional plea of guilty to possession of the SWD Cobray pistol, and he was sentenced to eight months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-7a.

1. Section 922(g) of Title 18, United States Code, provides, in relevant part, that it is unlawful for any person

> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g)(1). The statute further provides that the phrase "crime punishable by imprisonment for a term exceeding one year" does not include

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 921(a)(20).

A regulation issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives provides, in relevant part, that the phrase "crime punishable by imprisonment for a term exceeding 1 year" embraces "[a]ny Federal, State, or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. 478.11.

2. In 1994, the Naha District Court in Japan convicted petitioner of violating Japan's Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act. Pet. App. 2a. Each offense was punishable by imprisonment for a term exceeding one year. *Ibid.*

In June 1998, petitioner purchased a handgun from a gun store in Pennsylvania. Pet. 2. Federal law required petitioner to complete a form provided by the Bureau of Alcohol, Tobacco, Firearms and Explosives before making the purchase. 27 C.F.R. 478.124. In completing that form, petitioner answered "no" to the

question "have you ever been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?" Pet. 2. A subsequent search of petitioner's apartment, conducted pursuant to a search warrant, uncovered a Browning .380 caliber pistol and 335 rounds of ammunition. Govt. C.A. Br. 6; PSR ¶ 10.

On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned a four-count indictment against petitioner, charging him with one count of making a false statement that was intended or likely to deceive a licensed firearms dealer, in violation of 18 U.S.C. 922(a)(6), and with three counts of possessing firearms or ammunition in or affecting interstate commerce while having been previously convicted in Japan of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). Pet. App. 8a-9a.

3. Petitioner moved to dismiss the indictment on the grounds that the reference in Section 922(g)(1) to "convict[ions] in any court" embraces only domestic convictions, and that his Japanese convictions could not be considered because they were obtained through procedures that petitioner alleged were fundamentally unfair. Pet. App. 10a. The district court denied the motion to dismiss. Responding to petitioner's argument that a conviction in a foreign court could not serve as a predicate conviction under Section 922(g)(1), the district court held that the phrase "any court" in Section 922(g)(1) was not ambiguous and thus included all courts, domestic or foreign. Pet. App. 11a-16a. The district court also rejected petitioner's claim that his convictions in Japan had been obtained unfairly. After examining the trial records from the Japanese criminal

proceeding, *id.* at 29a-39a, the district court found that the convictions were "sufficiently consistent with our concepts of fundamental fairness * * * that we may have confidence in the reliability of the fact-finding process," *id.* at 39a.[1]

4. The court of appeals affirmed. Pet. App. 1a-7a. In holding that foreign convictions could serve as predicate convictions under Section 922(g)(1), the court of appeals agreed with the reasoning of the Fourth Circuit in *United States* v. *Atkins* 872 F.2d 94, cert. denied, 493 U.S. 836 (1989), and the Sixth Circuit in *United States* v. *Winson*, 793 F.2d 754 (1986). Pet. App. 3a n.2.

The court of appeals also rejected petitioner's claim that the district court erred in recognizing the particular judgment of the Japanese court. As an initial matter, the court agreed that it was necessary to ensure that a foreign predicate conviction under Section 922(g)(1) "comports with our notions of fundamental fairness required by the U.S. Constitution." Pet. App. 5a. To provide "procedural safeguards" in this area, the court of appeals adopted Section 482 of the Restatement (Third) of Foreign Relations Law of the United States (1986), which concerns the non-recognition of foreign judgments. Pet. App. 5a-6a. That Section provides:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
>
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals

---

[1] The entire record for petitioner's criminal trial was submitted to the district court; accordingly, the court did not hold an evidentiary hearing as originally requested by petitioner. Pet. App. 28a-29a.

or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

The court of appeals concluded that, applying the Restatement test, "there were no grounds for non-recognition of the Japanese conviction as the predicate offense to [petitioner's] § 922(g)(1) conviction." Pet. App. 6a

(noting that "the district court explicitly determined that the Japanese conviction comported with our concepts of fundamental fairness").

The full court of appeals denied rehearing en banc. Pet. App. 41a-42a.

DISCUSSION

Petitioner contends (Pet. 4-14) that this Court's review is warranted to resolve a conflict in the circuits on the question whether convictions obtained in the courts of foreign countries can serve as predicate offenses under 18 U.S.C. 922(g)(1).[2] The government agrees that there is a circuit conflict, and that the conflict is highly unlikely to dissipate through further consideration of the issue in those or other circuits. Furthermore, while the issue has not arisen frequently, the court of appeals' decisions document that it is a recurring one and the government, in fact, intends to continue to prosecute violations of Section 922(g)(1) based on foreign convictions. In addition, the Bureau of Alcohol, Tobacco, Firearms and Explosives has a strong interest in being able to administer federal firearms law on a uniform national basis. Therefore, the government does not oppose granting the petition for a writ of certiorari.

The Third Circuit's decision in this case holding that the phrase "convicted in any court" embraces convictions entered by foreign courts is consistent with rulings of the Fourth and Sixth Circuits. In *United States* v. *Winson*, 793 F.2d 754 (1986), the Sixth Circuit interpreted the phrase "any court" in 18 U.S.C. 922(h)(1), a predecessor to Section 922(g)(1). Section

[2] Petitioner does not seek this Court's review of the court of appeals' holding (Pet. App. 6a) that his Japanese convictions were obtained in a fundamentally fair manner. See Pet. 3 n.1.

922(h)(1) prohibited the possession of firearms by any person "who is under indictment for, or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(h)(1) (1982). The *Winson* court held that the words "any court" are unambiguous in their scope and thus are not limited to convictions entered by domestic courts. *Winson*, 793 F.2d at 757. The court further explained that the purpose of the statute was to prevent the possession of firearms by individuals convicted of serious crimes, and the court could "perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." *Id.* at 758.

The Fourth Circuit agreed, holding in *United States* v. *Atkins*, 872 F.2d 94, cert. denied, 493 U.S. 836 (1989), that the language of Section 922(g)(1) unambiguously manifests Congress's intent that foreign convictions be included within the scope of the provision. *Id.* at 96. The court of appeals reasoned that "'[a]ny' is hardly an ambiguous term, being all-inclusive in nature." *Ibid.*[3]

The Tenth and Second Circuits, however, have taken the contrary view. In *United States* v. *Concha*, 233 F.3d 1249 (2000), the Tenth Circuit overturned a sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), on the ground that foreign convictions are not within the ambit of Section 922(g)(1). Section 924(e) imposes a mandatory mini-

[3] A number of courts have interpreted "any court" to include military courts. See *United States* v. *Martinez*, 122 F.3d 421, 424 (7th Cir. 1997); *United States* v. *MacDonald*, 992 F.2d 967, 969-970 (9th Cir. 1993); *United States* v. *Lee*, 428 F.2d 917, 920 (6th Cir. 1970), cert. denied, 404 U.S. 1017 (1972).

mum sentence of 15 years on a person who violates Section 922(g) and "has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both." 18 U.S.C. 924(e)(1). In *Concha*, the government predicated the sentencing enhancement on three convictions entered in the United Kingdom. 233 F.3d at 1253. A divided court of appeals held, however, that foreign convictions were not "convictions by any court" for the purposes of Sections 922(g)(1) and 924(e)(1). *Ibid.* The majority noted that Congress defined "crime punishable by imprisonment for a term exceeding one year" to exclude federal or state business crimes, including antitrust violations, unfair trade practices, and restraints of trade, and certain state-law misdemeanors. 18 U.S.C. 921(a)(20). The majority expressed concern that applying Section 922(g)(1) to include foreign crimes would result in the "anomalous situation that fewer domestic crimes would be covered than would be foreign crimes," because foreign business crimes are not excepted. 233 F.3d at 1254. The majority further noted (*ibid.*) that the Sentencing Guidelines limit enhancements based on prior controlled substance offenses, Sentencing Guidelines § 2K2.1, to offenses arising under federal and state law. See Sentencing Guidelines § 4B1.2[4] Finally, the majority expressed concern that defendants might have difficulty collaterally attacking their foreign predicate convictions. *Id.* at 1255.

[4] Section 4A1.3 of the Sentencing Guidelines, however, separately provides that foreign convictions may be used to determine a defendant's sentence where the defendant's criminal history otherwise would not adequately reflect his past criminal conduct or his likelihood of recidivism. See Sentencing Guidelines § 4A1.3, comment (n.2(A)(i)); *United States* v. *Concha*, 294 F.3d 1248, 1251 (10th Cir. 2002), cert. denied, 537 U.S. 1145 (2003).

Judge Baldock dissented. *Concha*, 233 F.3d at 1257. He emphasized that "[a]bsolutely nothing in the plain and unambiguous language of § 924(e)(1) indicates that Congress intended to exclude from the statute's coverage a dangerous felon whose unlawful conduct occurred outside the United States," and that policy reasons "why Congress could have excluded such a felon * * * do not justify altering the statute's plain language by judicial fiat." *Ibid.*

In *United States* v. *Gayle*, 342 F.3d 89 (2003), as amended on rehearing (Jan. 7, 2004), the Second Circuit followed the Tenth Circuit's lead and overturned a conviction under Section 922(g)(1) on the ground that the term "convicted in any court" refers exclusively to domestic convictions. Finding the statute ambiguous for the reasons provided by the Tenth Circuit in *Concha*, the court turned to the legislative history and found "illuminating" a Conference Report's silence about the coverage of foreign convictions. 342 F.3d at 95 n.6. The court further found troubling the "complete silence of the statute" on "the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice." *Id.* at 95.[5]

The division in the courts of appeals is not likely to be resolved without intervention by this Court.[6] Restoring

[5] On February 11, 2004, the Second Circuit denied the government's petition for rehearing en banc in *Gayle*.

[6] District courts have issued conflicting decisions as well. Compare *United States* v. *Jalbert*, 242 F. Supp. 2d 44, 47 (D. Me. 2003) ("The phrase 'any court,' on its face, encompasses foreign as well as domestic courts."), and *United States* v. *Chant*, Nos. CR 94-1149 & CR 94-0185, 1997 WL 231105, at *1-*3 (N.D. Cal. Apr. 4, 1997) (concluding that "A Foreign Conviction May Serve as the Predicate Offense for a Violation of 18 U.S.C. § 922(g)(1)"), aff'd on other grounds, No. 98-10088, 1999 WL 1021460 (9th Cir. Nov. 9, 1999) (201 F.3d 445 (Table)), with *Bean* v. *United States*, 89 F. Supp. 2d 828, 838 (E.D. Tex. 2000) (holding that Section 922(g)(1) does not include foreign predicate convictions), aff'd, 253 F.3d 234 (5th Cir. 2001), rev'd on other grounds, 537 U.S. 71 (2002).

uniformity to the interpretation of a federal criminal provision is a valid basis for this Court to exercise its discretion to grant the petition for a writ of certiorari. See Sup. Ct. R. 10(a).

The government notes, however, that the issue that has divided the courts of appeals has not arisen frequently. The fact that only five court of appeals and three district court decisions over the course of 18 years have been reported suggests that prosecutions under Section 922(g)(1) that rely upon foreign convictions are relatively infrequent. The government also is not aware of any other prosecutions currently pending that are contingent upon construing Section 922(g)(1) to embrace foreign convictions. The Court thus could elect to allow further development of the issue in the lower courts in order to assess its practical significance.

The issue, nevertheless, is a recurring one. Three of the court of appeals decisions and two of the district court decisions have arisen in the last three years. The government, moreover, intends to continue to bring prosecutions under Section 922(g)(1) based on foreign convictions in appropriate cases. And the Bureau of Alcohol, Tobacco, Firearms and Explosives has an interest in being able to apply a uniform national rule in regulating or giving advice to persons with foreign convictions who seek to become licensed firearm importers, manufacturers, or dealers, or who seek to possess firearms.

Finally, Congress's recent enactment of other legislation that predicates criminal liability on convictions entered "in any court" suggests that definitive guidance by this Court would be of value at this time. See 18 U.S.C. 175b(d)(2)(B) (prohibition on possession of biological weapons), added by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Title VIII, § 817(2), 115 Stat. 386 (Oct. 26, 2001).[7]

CONCLUSION

The government does not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

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FEBRUARY 2004

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[7] The same issue could also arise under similarly worded provisions involving the federal regulation of explosive materials, 18 U.S.C. 842(d)(2) and 842(i)(1), but the government is not aware of any reported cases raising the foreign conviction issue under those provisions. The issue could have significance in the immigration area as well, because the Immigration and Nationality Act's definition of "aggravated felony" cross-references convictions under Section 922(g)(1). See 8 U.S.C. 1101(a)(43)(E)(ii).

(3)

Supreme Court, U.S.
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No. 03-750

IN THE

Supreme Court of the United States

GARY SHERWOOD SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The statute in question, § 922(g)(1) of Title 18, United States Code, makes it unlawful:

> (g) . . . for any person
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year: . . .
>
> to possess in or affecting commerce, any firearm.

In the instant matter, Petitioner's only conviction occurred in Okinawa, Japan, and it was this Japanese conviction that served as the predicate felony in this § 922(g)(1) prosecution. The Petitioner filed a motion to dismiss the indictment arguing that foreign felonies were not intended to count, as the term "in any court" means any court in the United States. The motion was denied by the trial court and the Court of Appeals affirmed.

The question presented, therefore, is whether the term "convicted in any court" contained in 18 U.S.C. § 922(g)(1) includes convictions entered in foreign courts.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption.

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OPINIONS BELOW

The opinion in petitioner's direct appeal to the United States Court of Appeals for the Third Circuit, *United States v. Small*, 333 F.3d 425 (3d Cir. 2003), is printed in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a. The order denying the petition for rehearing is at Pet. App. 41a. The district court's opinion denying Petitioner's motion to dismiss, *United States v. Small*, 183 F.Supp 2d 755 (W.D. Pa. 2002), is at Pet. App. 8a.

JURISDICTION

On June 23, 2003, the Court of Appeals affirmed the conviction. On July 23, 2003, the Court of Appeals denied the petition for rehearing. The petition for writ of certiorari was timely filed on November 17, 2003, following an extension of time granted by Justice Souter on October 15, 2003, and was granted by this Court on March 29, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES

Provisions of the following are in Pet. App., 43a: 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 921(a)(20).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On August 30, 2000, the Petitioner, Gary Sherwood

Small, was indicted in the U.S. District Court for the Western District of Pennsylvania for violation of 18 U.S.C. § 922(g)(1) (ex-felon not to possess firearms) and § 922(g)(6) (false statements to firearms dealer). (47a).[1]

On December 4, 2000, Mr. Small filed a motion to dismiss the indictment on the basis that (1) foreign convictions do not qualify as predicate prior convictions under 18 U.S.C. § 922(g); and, (2) alternatively, even if there is no flat prohibition against the use of foreign convictions, this particular conviction was not sufficiently fundamentally fair to be counted. (52a).

The United States filed an opposition to the motion to dismiss. (97a). It also filed the record of the Japanese trial. (391a-713a, 187a). Small duly responded. (203a).

On January 16, 2002, the trial court entered a memorandum order denying Small's motion to dismiss without a hearing. (13a, Pet. App. at 8a). On January 31, 2002, Small filed a motion to reconsider that order and filed exhibits. (246a). This motion was denied by the court on February 1, 2002. (46a).

On March 14, 2002, Small entered a conditional plea of guilty to Count 2 of the indictment, alleging a violation of 18 U.S.C. § 922(g)(1). (714a). On June 19, 2002, the trial court sentenced him to eight months imprisonment and three years supervised release. Counts 1, 3 and 4 were dismissed on the motion of the United States. (719a).

On June 25, 2002, Small filed a timely notice of appeal. The Court of Appeals affirmed on June 23, 2003. (Pet. App. at

[1] This and all of the following record references refer to the Appendix to Appellant's Brief that was filed in the U.S. Court of Appeals for the Third Circuit. The parties in this case have agreed to dispense with the joint appendix and proceed on the original record.

1a.) The petition for rehearing and suggestion for rehearing en banc was denied on July 32, 2003. (Pet. App. at 41a).

(ii) Statement of Facts

On June 2, 1998, the Petitioner, Gary Sherwood Small, purchased a handgun from the Delmont Sport Shop, a firearms dealer in the community where he resided. (47a). Mr. Small filled out the ATF form with his actual name and address, and answered "no" to the question had he ever been convicted of a crime punishable by a term exceeding one year in prison. (47a).[2]

While Mr. Small had never been convicted of any crime in the United States, in 1994, in Okinawa, Japan, he was convicted of an offense which carries a penalty of more than one year in prison.

Specifically, Small was charged in Japan with violating the Guns and Knives Control Law and the Explosives Control Law. (261a). Apparently a hot water heater was shipped from the United States to Okinawa, Japan, by air freight. Small appeared to pick up the package at the Naha Airport and when he did so, he was arrested. The hot water heater, which Mr. Small never took possession of or opened, allegedly contained several pistols, a rifle, and ammunition. (277a-362a).

Mr. Small made allegations in his pleadings before the U.S. district court about grave deficiencies in the Japanese proceedings, some of which appear in the record of the

[2] Although the indictment charged in Count I, making a false statement to a federally licensed firearms dealer, this count was ultimately withdrawn. (719a).

Japanese trial and some of which do not.[3]

In regard to the matters that appear in the record, the following is revealed:

a. Petitioner Small had no right to nor did he receive a jury trial. (*Passim*);

b. The testimony of three crucial witnesses was presented in the form of sworn written statements of each witness with no cross-examination, no defense attorney or defendant present, and the witness not being present in court. *See* Exhibit 13, Deposition of Peter Cappuccio (503a-514a); Exhibit 14, Deposition of Susan Jyozaki Summerfield (517a-534a); and Exhibit 15, Deposition of Toshimi Ohashi (536a-551a). Small had no right or opportunity to confront or cross-examine these prosecution witnesses.

The affidavits were filed to prove that Mr. Small shipped a hot water heater from Pittsburgh (found to contain firearms in Japan). But one witness stated in her affidavit that, when she was shown a photo of Mr. Small, she was not sure if it was him. (Exhibit 15, 545a). Two witnesses admitted that, after the water heater was dropped off for shipment, other persons could have had access to it, and could have placed firearms in it, during the 2-3 days before it was shipped. (Exhibit 14, 531a; Exhibit 15, 546a).

c. The trial appears to have begun on March 15, 1993.

---

[3] Although the question of whether the Japanese conviction was sufficiently fundamentally fair to be counted is not specifically raised as a question in this brief, a discussion of Mr. Smalls' experience in the Japanese Criminal Justice System is relevant in considering why Congress would intend to include only American convictions within the reach of § 922(g)(1)'s prohibition. Despite the fact that the Japanese Constitution, made a part of the record below, reads in many respects like that of the United States, it is apparently ignored.

There were three Judges hearing the case, Chief Judge Kyoichi Miyogi, Judge Yashiro Akiba and Judge Kenji Tanaka. (*See* Exhibit 16, 554a). There was a second day of trial on April 26, 1993, six weeks later. (*See* Exhibit 17, 562a). The third day of trial was June 8, 1993. (*See* Exhibit 18, 580a). On this date, for no apparent reason, Judge Kenji Tanaka no longer was part of the three Judge court, and was replaced by Judge Takeshi Ebara. There is no indication of whether the new judge learned anything at all about the earlier proceedings. Nothing of record indicates whether he was shown a transcript, or if one actually existed.

d. On April 26, 1993, Gary Small was called to the witness stand by the *prosecutor*, was shown 62 separate items (including handguns, rifles, scopes and bullets), and was asked in each case, "Do you recognize this?" (*See* Exhibit 17, 568a-576a) Small refused to answer each of the questions, but the prosecutor, undaunted, continued on 62 times. *Id.* If tried in the United States, this would have been a blatant violation of Mr. Small's fundamental right to not to be compelled to testify against himself.

References were repeatedly made by witnesses to Small's *silence* during the trial. (*See* Exhibit 18, 587a, Q 45). And again, for a second time during the trial, Small was called to the stand by the prosecutor, and was apparently shown various customs and shipping forms that he allegedly wrote, and was asked repeatedly if he recognized the forms. (*See* Exhibit 20, 639a) In each instance he refused to answer the question. (639a).

During the closing argument, the prosecutor stated as follows:

> The Defendant shows absolutely no remorse in regard

to this crime.

At the early stages of the investigation, the Defendant carried out a hunger strike to "protest his apprehension," and following that, his attitude has shifted from being completely silent, refusing to provide statements, to denying the charges. In the Public Hearings, the Defendant has consistently taken the attitude of remaining silent or stating that he "does not wish to answer the question."

Certainly, one can say that such an attitude is unavoidable since the Defendant denies the charges, but one can sense an insolent attitude in the Defendant, and generally speaking, the Defendant seems to have absolutely no comprehension of his responsibility for perpetrating this crime. (Exhibit 24, 709a-710a)

e. The entire trial transcript contains repeated and very prejudicial rank hearsay. The record reveals that not only is the defendant given no right of confrontation, but that virtually nothing offered by the prosecution is subject to objection. An example appears in the testimony of Kityomitsu Nakama, who operated a motorcycle shop in Okinawa City which was apparently frequented by Mr. Small. The following question by the prosecutor and answer by the witness appear:

> Have you heard about guns relating to the defendant?
>
> I heard from somebody that he brings guns from the United States and sells them to organized crime on the mainland of Japan. (See Exhibit 22, 683a, Q. 19)

f. The "trial" took place in short multiple sessions over

a 13 month period (from March 15, 1993 (554a) through April 12, 1994 (705a)).

As noted, the U.S. district court denied Small's motion to dismiss without a hearing. However, in his motion to dismiss (52a-56a, 203a-219a) and motion to reconsider order denying that motion (220a-245a), Small alleged a series of fundamental defects in the Japanese proceedings that did not appear and could not be ascertained from a review of the "transcript" of the Japanese trial. These included:

a. Small was interrogated immediately following his arrest for 25 consecutive days with no right to counsel and no right to bail. (54a, 60a, 223a). Although he did not confess during this period, his silence and "insolent" attitude was extensively referred to and commented on during the trial by the prosecution. (709a-710a, 587a, 639a).

b. At no time following Mr. Small's arrest was bail ever mentioned or considered. He remained incarcerated and held almost totally incommunicado from his arrest in December of 1992 until his conviction in April of 1994, 17 months later. (54a, 60a, 222a).

c. Although a Japanese lawyer appeared to see Mr. Small a few days after his arrest, the lawyer's English was not good. Small spoke virtually no Japanese. The only discussion with Small was an effort to convince him to plead guilty. The lawyer was not allowed to be present when Small was interrogated for 25 straight days. (54a, 60a, 223a). Apparently this is a common practice in the Japanese Criminal Justice System. (218a, 238a).

d. Mr. Small's attorney sat about 20 feet away from him during the entire trial, making any communication with counsel impossible. Mr. Small was never asked or given an opportunity to put on any witnesses. (60a, 223a).

e. Although a translator was present, he did not sit by Mr. Small, he did not translate everything, and Small could not meaningfully question him about things he did not understand. (60a, 223a). In fact, on one occasion, about 6 or 8 months into the trial, Small heard the translator say something about drugs. After Small caused a commotion, because his attorney did nothing, it turned out that the Court was mistakenly proceeding with a drug trial – the wrong case. (60a, 211a).

f. Following his conviction, Small was not permitted to, nor was he told that he could appeal his conviction. (54a, 61a, 224a).

g. Small intended to call an expert had there been a hearing on his motion to dismiss. He attached an affidavit from his expert to his motion to reconsider the dismissal (234a-245a) in which the expert – a professor of law at the University of Illinois with expertise in the Japanese legal system – indicated that there is great potential for abuse in Japanese trials, particularly for foreigners, that silence is always used against the accused, and that the lack of confrontation and use of "statements of witnesses" is common. He further stated that Japanese criminal procedures, including pre-trial detention, demand for confessions, inability to prepare for trial and have meaningful interactions with one's attorney, have attracted criticism from the United Nations Human Rights Commission, Amnesty International, the United States Department of State, and the Japanese Federation of Bar Associations. (238a). This expert's testimony would have been vital in establishing that Small's trial was not an anomaly, but was essentially a typical trial in the Japanese system.

SUMMARY OF ARGUMENT

Section 922(g)(1) of Title 18, U.S.C., makes it a crime for a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Although Congress did not define the term "any court," it did define the phrase "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 921(a)(20). This definition clearly suggests that Congress was referring to Federal and State convictions, and not foreign convictions. The definition of "crime punishable by imprisonment for a term exceeding one year" excludes a variety of Federal and State crimes (anti-trust, business regulatory offenses, and State misdemeanors punishable by no more than two years imprisonment) without making any reference to foreign convictions for similar offenses.

If § 922(g)(1) is interpreted to include foreign convictions, the anomalous situation would exist that persons with foreign convictions would face greater restrictions and less protection than persons convicted of similar crimes by a Federal or State court. No reason exists to believe Congress intended such a peculiar result.

In addition, § 922(g)(9) makes it a crime for a person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. As in § 922(g)(1), the identical term "any court" is not defined. However, § 921(33)(A) explicitly defines "misdemeanor crime of domestic violence" as "a misdemeanor under Federal or State law" with certain other elements. Congress may have deemed this explicit definition necessary to prevent judicial misconstruction extending the crime to foreign convictions, as had taken place with § 922(g)(1). However, no reason exists to believe that

Congress intended "any court" in both § 922(g)(1) and § 922(g)(9) to mean anything other than a Federal or State court.

The Petitioner, Gary Sherwood Small, was convicted of a crime in Japan. As the record reflects, he had none of the fundamental protections which are basic in the American system of justice. He was given no right to bail and was questioned without counsel following his arrest for 25 straight days. Critical evidence was admitted in the form of paper affidavits with no right to confront the witnesses. He had no right to a jury trial. He was called to the stand by the prosecution and asked question after question which he refused to answer. Throughout the trial and in his closing arguments, the prosecutor referred to Small's silence as proof of his guilt and of his "insolent attitude." He had no right to appeal.

Japan may be a modern industrial society, but its legal system lacks the fundamental rights to due process considered in the United States to be necessary for a free society. This very case exemplifies why Congress would not have allowed foreign convictions to be the basis for prohibiting an American from possession of a firearm.

In less developed systems of justice, such as Iraq, a Taliban court in Afghanistan, and military tribunals in Third World countries, the guarantees of a fair trial would be considerably less. Congress, when deciding whether to make an otherwise lawful act a serious felony by virtue of a prior conviction, would have taken into account the serious due process and fundamental fairness problems that are necessarily implicated if foreign convictions could satisfy the predicate conviction requirement under § 922(g)(1).

The statutory development and legislative history confirm that "any court" means a Federal or State court. The terms "convicted in any court of a crime punishable by

imprisonment for a term exceeding one year" originated in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as did the exclusion of "Federal or State" business regulatory offenses. Title VII used the terms "convicted by a court of the United States or of a State or any political subdivision thereof of a felony."

The Gun Control Act (GCA) of 1968 replaced Title IV and kept the same language. The Senate bill imposed the disability on persons convicted "in any court" of felonies, defining "felony" to include only offenses under Federal and State law. The Conference Report, recommending the language that would pass, did not regard the differences as substantive. Besides excluding Federal and State business regulatory offenses, the GCA also excluded State misdemeanors punishable by two years or less.

Finally, the GCA amended Title VII, but retained its reference to convictions by courts of the United States, States, and political subdivisions thereof.

Consistent with the above, the ATF interpreted the law as not including foreign convictions. Foreign law did not have the same protections as found in American justice, offenses are not comparable, and documentation would be difficult to obtain. Those reasons would have motivated Congress to exclude foreign convictions.

In enacting the Firearms Owners' Protection Act of 1986, Congress intended to incorporate prior law, under which "any court" referred to Federal and State courts. It consolidated Title VII into § 922(g), and in § 921(a)(20) expanded the exclusions from firearm disabilities to include pardons, civil rights restorations, and expungements. Once again, these procedures are pertinent only to Federal and State convictions. Finally, as Senator Hatch remarked, it granted

"authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony." 131 Cong. Rec. S8689 (June 24, 1985). Foreign jurisdictions were not considered.

The Brady Handgun Violence Prevention Act of 1993 further demonstrates Congress' intent that the term "court" as used in the Gun Control Act means a Federal or State court. Provision was made to conduct background checks only in Federal and State records. Procedures for correction of records refer only to Federal and State records, and actions to correct records may be brought in appropriate Federal and State courts. Records of convictions by foreign courts are irrelevant.

Finally, both Congressional intent and the rule of lenity mandate that the statute be narrowly construed to exclude foreign convictions. First, Congress deemed constitutional rights to be at stake, and would not have intended that these rights be subject to forfeiture other than through the procedures of American law guaranteeing due process of law. Second, given the ambiguity, the related principles of the rule of lenity and avoidance of vagueness mandate a narrow construction.

ARGUMENT

I. THE PLAIN TEXT OF THE STATUTE MAKES CLEAR THAT A "CONVICTION IN ANY COURT" MEANS A CONVICTION IN ANY COURT IN THE UNITED STATES

Gary Sherwood Small was convicted of violating 18 U.S.C. § 922(g)(1). Section 922(g)(1) reads in relevant part as follows:

> It shall be unlawful for any person –
>
> (1) Who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to possess in or affecting commerce, any firearm . . . .

If the term "any court" means any court in the United States, Small's Japanese conviction would not qualify as a predicate conviction, and he would be not guilty of violating § 922(g)(1).

Five courts of appeals have addressed this issue. Three, including the Third Circuit in Mr. Small's case, have concluded that "any court" means any court in the world. Two circuits have held that "any court" means any American court.

The first appellate decision to address this issue was *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986). Winson was charged with violating 18 U.S.C. § 922(h)(1) (repealed), receipt of a firearm after having been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Winson had been convicted of counterfeiting in Argentina and fraud in Switzerland. The trial court dismissed the indictment, holding that the meaning of the term "any court" was ambiguous, that the principle of lenity was controlling, and thus that only convictions by courts within the United States were applicable. *See* 793 F.2d at 756.

The Sixth Circuit reversed, opining that "an examination of the legislative history of Title IV reveals no discussion of the actual meaning of the phrase 'in any court'." *Id.* at 757. It held that the term "any court" is not ambiguous and means any court anywhere in the world. Despite having found no discussion by Congress as to the meaning of "any court," *Winson* concluded that it is "evident" that Congress did not intend to limit §

922(g)(1)'s reach only to "convictions by courts of the United States or of a state." *Id.*

This is "evident," *Winson* found, because of what it perceived as a "partial tension" between section 922 and 18 U.S.C. App. § 1202 (now repealed).[4] *Id.* at 757, citing *United States v. Batchelder*, 442 U.S. 114, 119-21 (1978). To the contrary, *Batchelder* noted the "overlap" and "partial redundancy" of the two statutes "both as to the conduct they proscribe and the individuals they reach." *Id.* at 118. The only differences *Batchelder* found in the two provisions were a slight difference in the definition of "convicted felons," *id.* at 119 n.5, and that different "penalties" exist under each statute. *Id.* at 119.

In sum, *Winson* relied on the thin thread of lack of any discussion in Congress of the meaning of "in any court," and a wholly inapposite precedent, *Batchelder*, which made no mention of the issue at hand.

United States v. Atkins, 872 F.2d 94 (4th Cir. 1989), followed *Winson*. It found that the "scant legislative history of 18 U.S.C. § 922 . . . offered no illumination as to Congress' intended meaning," and that "'any' is hardly an ambiguous term being all-inclusive in nature." *Id.* at 96. It offered no further discussion or analysis, and contributes nothing to strengthen the argument that "any court" means "any court in the world."

The issue was not revisited until *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000), which held that the term "convicted in any court" was intended to mean only courts in the United States. *Concha* focused on the definition in §

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[4] Section 1202(a), a predecessor statute to the instant one, and its impact on Congress' intent in 18 U.S.C. § 922(g)(1), is discussed in detail in Part III of this brief.

921(a)(20), which had been ignored by *Winson* and *Atkins*, and which provides in part:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) any *Federal* or *State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any *State* offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. (Emphasis added.)

Concha explains why this language, when read *in pari materia* with the term "in any court," precludes the possibility that foreign convictions were intended to be included:

> This definition [18 U.S.C. § 921(a)(20)] excludes certain federal and state crimes from § 922(g)(1), but makes no comparable mention of foreign crimes. If § 922(g)(1) were meant to cover foreign crimes, we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes. For example, while someone who had been convicted of a U.S. antitrust violation would be allowed to possess a firearm, someone convicted of a British antitrust violation would not be allowed to possess a firearm. There is no reason to believe that Congress intended this peculiar result in § 922(g)(1).
>
> Thus, the definition of "crime punishable by imprisonment for a term exceeding one year" provides some evidence that Congress intended § 922(g)(1) to

> cover only federal and state crimes. Therefore, when the Armed Career Criminal Act requires "three previous convictions by any court referred to in section 922(g)(1)," it would exclude foreign convictions.

Concha, 233 F.3d at 1254.

As *Concha* observes, it would make no sense that Congress intended to give someone less protection when his conviction was obtained in a foreign jurisdiction as opposed to a court in the United States. Can it be that Congress intended that a person convicted of an unfair trade practice in a foreign country – for instance, selling a Bible in Afghanistan and convicted by a Taliban court – is prohibited from possessing a firearm in the United States, but a person convicted of an unfair trade practice in the United States is not? As *Concha* held, "there is no reason to believe that Congress intended this peculiar result in § 922(g)(1)." *Id.* at 1254.

Concha did what *Winson* and *Atkins* failed to do – to read "any court" in the context of the statute as a whole and not in isolation. This principle was well articulated by this Court in *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), as follows:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole. . . ." (Citations omitted).

Looking beyond the bare words "any court" to the operative phrase, "crime punishable by imprisonment for a term exceeding one year," and to the various references to Federal and State crimes excluded from that term in § 921(a)(20), it is clear that only convictions by Federal and State courts are included. That is the only interpretation which renders the statute as "a symmetrical and coherent regulatory scheme." Stretching the statute to include foreign convictions results in absurd consequences.

If "any court" means any court in the world, the following set of peculiar and obviously unintended results would follow:

(a) An individual convicted of an anti-trust violation in France or Iran could not possess a firearm, but an individual convicted of a similar offense in the United States could possess a firearm. This would give foreign courts greater weight then our own. *See* § 921(a)(20)(A).

(b) An individual convicted of an offense in Canada classified as a misdemeanor which carries a maximum sentence of two years imprisonment could not possess a firearm, but an individual convicted of an offense in a State court in the United States which carries a maximum sentence of two years imprisonment could possess a firearm. *See* § 921(a)(20)(B).

What possible reason could Congress have had, as *Concha* observes, to create a statutory scheme in which Americans would be exposed to being convicted of a serious crime under § 922(g)(1) because of a prior foreign conviction, when being convicted of the same prior offense in this country would create no criminal liability at all.

If § 922(g)(1) applies to foreign convictions, a person engaging in a multi-million dollar anti-trust scheme in this country, sentenced to prison after a fair trial and appeal and

thereafter released, would be permitted to possess a firearm in the United States. An American, however, convicted of an illegal business practice in Afghanistan during the Taliban regime or in Iraq during the Hussein regime, would be subject to a ten year prison sentence if he or she thereafter possessed a firearm in this country.

The Federal Sentencing Guidelines *exclude* foreign convictions when computing one's criminal history for sentencing purposes. *See* § 4A1.2(H). As *Concha* points out, it is difficult to accept the proposition that a foreign conviction which cannot be counted for the mere purposes of computing a criminal history, can be used to prove an element of the offense – clearly a more significant aspect of the criminal proceedings on the due process and fundamental fairness scale. 233 F.3d at 1254.

Despite *Concha*'s compelling logic, the Third Circuit in Petitioner Small's case held that "any court" includes foreign courts. But in so doing, the Third Circuit provided little to the debate, and simply concluded in a footnote:

> The parties spent a great deal of their briefs arguing about the definition of § 922's "any court." We view this, however, as a tempest in a teapot, and for the reasons set forth in *United States v. Atkins*, . . . foreign convictions, generally, can count as predicate offenses for the purposes of § 922. Pet. App. 3a n.2.

Just after the Third Circuit's "tempest in a teapot" holding, *United States v. Gayle*, 342 F.3d 89 (2d Cir. 2003), joined the Tenth Circuit in concluding that the term "convicted in any court" refers exclusively to domestic convictions. *Gayle* agreed that by "looking to the statutory scheme as a whole,"

and by "appreciating how sections relate to one another," the more logical conclusion is that "a conviction in any court" means a conviction in any court in the United States. *Id.* at 93. *Gayle* explained (*id.* at 92-93):

> Our textual analysis of what constitutes a predicate offense under § 922(g)(1), however, does not end with the words "in any court." "The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003); *see Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 1992) ("The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another.").

Gayle, 342 F.3d at 92-93.

Gayle referred to the excluded Federal and State offenses set forth in § 921(a)(20), agreeing with *Concha* concerning the absurd results which stem from considering foreign convictions. *Gayle* adds:

> [W]e do not understand the logic whereby a person convicted of an antitrust violation in a foreign country would not be allowed to possess a firearm, yet a person convicted of the same antitrust violation in the United States would be allowed to possess a firearm. . . . At the very least, § 921(a)(20) injects doubt as to whether Congress intended foreign convictions to serve as predicate offenses. *See Marvel Characters Inc. v.*

> *Simon*, 310 F.3d 280, 290 (2d Cir. 2002) (explaining our reluctance to read a statute in a way that could "lead to anomalous or unreasonable results" (quotation marks omitted)).

Gayle, 342 F.3d at 93.

Even without regard to the above, *Gayle* found "any court" to be ambiguous, on the common-sense basis that statutes normally refer to the institutions within the jurisdiction of the enacting authority. It explained:

> For instance, it is not unreasonable to understand statutory references to officers, officials, and acts of government as meaning those of the particular government. Just as a state statute authorizing "a police officer" to make an arrest probably means a police officer of that state and does not include police officers from foreign nations, so it is reasonable to read § 922(g)(1)'s reference to convictions as referring to convictions by courts in the United States.

Id. at 93.

After an examination of the legislative history and other tools of construction to resolve the textual ambiguity, *Gayle* concludes that "Congress did not intend foreign convictions to serve as predicate offenses under the felon-in-possession statute." *Id.* at 93.

While apparently not mentioned by any of the above decisions, the final two sentences of § 921(a)(20) provide:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction

> in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Determining the nature of a conviction "in accordance with the law of the jurisdiction in which the proceedings were held" refers to the jurisdictions of the United States and the fifty States, not to foreign countries. This "choice-of-law" clause has been interpreted exclusively as a determination of which Federal or State jurisdiction controls.[5] The "exemption clause" regarding expungements, pardons, and restorations of civil rights raises the issue of whether Federal or State law controls, and if the latter, which State. That is clear in this Court's decisions on these provisions as well as the enormous quantity of district and appeals court decisions that have been rendered since enactment of these provisions in 1986.[6]

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[5] *Beecham v. United States*, 511 U.S. 368, 373 (1994), notes:

> [I]n enacting the choice-of-law clause, legislators may have been simply responding to our decision *in Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 74 L. Ed. 2d 845, 103 S. Ct. 986 (1983), which held that federal law rather than state law controls the definition of what constitutes a conviction . . . .

[6] *See generally Beecham*, 511 U.S. 368; *Caron v. United States*, 524 U.S. 308 (1998). For a discussion of various precedents exhibiting the myriad issues arising under State law, *see* Stephen P. Halbrook, *Firearms*

It is unimaginable that Congress intended the courts to interpret the laws of foreign countries, and to consider for foreign countries and even individual states thereof – as the courts do for each of our fifty States – whether civil rights may be restored by operation of law or require specific proceedings for each felon. Whether civil rights are restored involves whether the felon has regained the rights to vote, to run for office, and to serve on a jury. *E.g.*, *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990). These rights do not even exist in many foreign countries.

Ignoring these questions, the government eschews the traditional tools of statutory construction and supports the simplistic view of *Atkins* that "'any' is hardly an ambiguous term being all inclusive in nature." 872 F.2d at 96. This Court rejected that narrow approach just recently in *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004). Looking at the meaning of the term "any" in the context of the statute as a whole, this Court asked whether the term "any entity" in the Telecommunications Act meant private entities only, or also public entities. *Id.* "'[A]ny' can and does mean different things depending upon the setting."[7] *Nixon* found it helpful to "ask how Congress could have envisioned" the provision "actually working" if applied expansively. 124 S. Ct. at 1561. Finding

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Law Deskbook: Federal and State Criminal Practice (Thomson/West, 2003), § 2:11.

[7] *Id.*, comparing *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (expansive meaning of "any other term of imprisonment" to include state as well as federal sentences), with *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 542-546 (2002) ("any claim asserted" narrowly interpreted to exclude certain claims dismissed on Eleventh Amendment grounds).

"strange and indeterminate results," it concluded "that Congress used 'any entity' with a limited reference to any private entity . . ." *Id.*

Similarly, reading "any court" expansively to include foreign courts would lead to strange and indeterminate results. Fundamental concepts of notice and due process cannot depend, as the appeals court here held, on esoteric treatises on international law. The language of the statute, assisted by the traditional tools of construction, must inform the citizen of what is forbidden. The peculiar and illogical results that the Courts in *Concha* and *Gayle* note would occur, require a narrower reading of the term "any" than that proposed here by the government. The term "any court" means Federal and State courts, and does not extend to foreign courts.

II. RELATED STATUTORY PROVISIONS MAKE PLAIN THAT "ANY COURT" REFERS TO FEDERAL AND STATE COURTS ONLY

In 1996, Congress amended § 922(g) with what is known as the "Lautenberg Amendment," which made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. § 922(g)(9), enacted by P.L. 104-208, Title VI, § 658(b), 110 Stat. 3009 (1996).

Paragraphs (1) and (9) of § 922(g) are the same except that the former uses the phrase "of a crime punishable by imprisonment for a term exceeding one year," while the later uses the phrase "of a misdemeanor crime of domestic violence." Both provisions share the same language describing what is prohibited – "to ship or transport in interstate or foreign commerce or possess in or affecting commerce, any firearm or ammunition . .

. . ."

Just as § 921(a)(20) defines "crime punishable by imprisonment for a term exceeding one year," § 921(a)(33)(A) defines "misdemeanor crime of domestic violence." Keeping in mind that § 922(g)(1) and (9) both refer to "convicted in *any court*," part of the definition found in § 921(a)(33)(A) takes on exceptional significance:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –
>
> (I) is a misdemeanor under Federal or State law
>
> . . . .

It is clear from this definition that the term "convicted in any court" in § 922(g)(9) (the misdemeanor of domestic violence offense) means any court in the United States only, as the crime must be "a misdemeanor under Federal or State law." § 921(a)(33)(A)(I). By virtue of the fact that only a federal or state court can convict someone of a federal or state crime, "any court" necessarily means any American court.

It seems impossible that Congress could have intended the definition of "convicted in any court" found in § 922(g)(1) to mean any court in the world, but have intended the same term – "convicted in any court" found in § 922(g)(9) to mean any court in the United States.

But if Congress did intend the term "any court" in § 922(g)(1) to mean something different than the same term means in § 922(g)(9), which is highly unlikely, we are again faced with the anomalous situation that an individual convicted of a misdemeanor crime of domestic violence in a foreign country can

possess a firearm in the United States, but an individual convicted of an unfair trade practice in that same country cannot possess a firearm in the United States. The law cannot be read in a manner attributing to Congress the intent to have created such an absurd result.

Further, the fact that "convicted in any court" in § 922(g)(9) is clearly limited to American courts, is an indication that Congress wished that meaning to be explicitly stated to *preclude* any interpretation, as had already occurred in *Winson* and *Atkins*, that "any court" includes foreign jurisdictions.[8]

As discussed in Part I of this brief, the definition of "crime punishable by imprisonment for a term exceeding one year" in § 921(a)(20) strongly suggests, in order to avoid absurd results, that Congress intended to limit the term "any court" to American courts. The definition of "misdemeanor crime of domestic violence" in § 921(a)(33)(A) eliminates any doubt, at least in regard to § 922(g)(9) offenses, that "any court" absolutely means any American court. No logical argument can be made that in two so closely related provisions, any possible reason exists for Congress to have intended the term "any court" to mean something so totally different.

The plain and obvious meaning of this closely related section of the same section essentially lays to rest any claim that the term "any court" in § 922(g)(1) means anything other than any American court, which is clearly what that term means in §

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[8] *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used").

922(g)(9).[9]

III. POLICY REASONS SUGGEST WHY CONGRESS DID NOT INTEND FOREIGN CONVICTIONS TO COUNT AS PREDICATE CONVICTIONS

The plain meaning of § 922(g)(1), when read in relation to the definition section found in § 921(a)(20), clearly suggests that the prior convictions in "any court" referred to in the statute are limited to domestic convictions. Their sister provisions in §§ 921(a)(33)(A) and 922(g)(9) explicitly restrict "any court" to Federal and State courts. The following discusses underlying policy concerns that in all likelihood were considered by Congress in not wishing to include foreign convictions within the reach of § 922(g)(1).

The Statement of Facts, *supra*, discusses many of the deficiencies in terms of due process and fundamental fairness that Small faced during the time following his arrest and through trial in Japan. Clearly, any one of the parade of horribles which he experienced, had they occurred here, would have led to the reversal of his conviction. That all of these events occurred in one proceeding would be unimaginable in the United States.

[9] It is noteworthy that § 922(g) prohibits several other categories of persons from receipt of firearms, including "any person – . . . (5) who, being an alien – (A) is illegally or unlawfully in the United States . . . ." Illegal aliens likely account for the greater part of persons with foreign convictions who would be in the United States. Few legal residents have foreign convictions. "Prosecutions under Section 922(g)(1) that rely upon foreign convictions are relatively infrequent." Brief of the United States 11 (Feb. 2004). These circumstances explain why Congress would not have considered foreign convictions under § 922(g)(1), but filled the gap by and large by including illegal aliens in § 922(g)(5).

And these deficiencies occurred not in Afghanistan, Iraq or Somalia, but in Japan, a county that essentially adopted our constitution, albeit in form and not substance. While Congress intended to take guns out of the hands of dangerous criminals, it is highly unlikely that Congress did not envision the problem of being totally indiscriminate about which country's label or definition of dangerous criminal we would be willing to accept.

One need look no further than to this Court's jurisprudence to understand why Congress did not intend for foreign convictions to deprive American citizens of what we consider to be basic rights. The rights to counsel,[10] to confront one's accusers,[11] to remain silent,[12] to trial by jury,[13] and to proof

[10] "No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these [constitutional] rights [to remain silent]." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

[11] "[T]he rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them," this Court decided, is an "age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence . . . ." *Bruton v. United States*, 391 U.S. 123, 134 (1968) (citation omitted).

[12] "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[13] "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

beyond a reasonable doubt[14] are landmarks of the American legal system. This Court's rulings often result in the reversal of Federal and State convictions which were obtained in violation of these rights. It is difficult to imagine that Congress intended to recognize convictions where, as here, no pretense exists of guaranteeing these fundamental rights.

In *Bean* v. *U.S.*, 89 F.Supp. 2d 828, 837-38 (E.D. Texas, 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001), *rev'd on other grounds*, 537 U.S. 71 (2002), the district court held that foreign convictions were not intended to be included within § 922(g)(1). The court noted the dangers of using foreign convictions by referring to the Mexican conviction being relied on against Bean and the many due process problems present in that case. 89 F.Supp. 2d at 837-38. *Bean* concluded:

> This case is a perfect illustration as to why the phrase "any court" in 18 U.S.C. § 922(g)(1) cannot be interpreted to mean "any court in the world regardless of the severity of the crime or the due process which the defendant was entitled during the defense of his case."

Id. at 838.

Bean was denied counsel, an interpreter, and was charged with an offense – unknowing carrying of a box of ammunition – that "is hardly a crime 'serious' enough to take away an individual's right to possess a firearm." *Id.* Rather than Congress intending our trial courts to engage in the painstaking

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[14] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

case by case analysis of the justice system in each country in the world when a conviction occurs there, or the absurd notion that any foreign conviction would count, no matter how devoid of any notion of fundamental fairness, the more likely result is that Congress intended to exclude foreign convictions all together.

Bean, *id.* at 838 n.8, cited Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Statutes*, 35 Columbia Journal of Transnational Law, 503 (1977). That article concluded:

> [P]rocedural due process concerns are automatically raised with the use of foreign criminal convictions. The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials. . . . Although other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions. . . .

Id. at 520.

Similar considerations have led some State courts to reject foreign convictions. One such case, *People v. Braithwaite*, 240 N.W. 2d 293, 294 (Mich. Ct. App. 1976), explained as follows:

> In many ways, the constitutional guarantees which our

system of justice protects are different in both kind and degree than those recognized even in modern democratic systems such as Canada's. A conviction in a foreign jurisdiction may often have been impossible were the accused arrested, tried, and sentenced under the same standards as in the United States.[15]

Congress would not have intended that foreign convictions, obtained without the safeguards of our Bill of Rights, be used to deprive Americans of significant and fundamental rights.[16] Nor would Congress have intended that the courts analyze the criminal justice systems in potentially every country in the world to determine whether a given system measures up to American standards. The record in this case exemplifies why that is the case – under Japanese practice the rights to remain silent, to confront one's accusers, to counsel, and to bail are non-existent.

By excluding foreign convictions from § 922(g)(1)

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[15] *People v. Gaines*, 341 N.W.2d 519, 524 (Mich. Ct. App. 1983) (Maher, J., dissenting), notes:

> [T]he inquiry into the law of a jurisdiction to determine its fairness will not work out in practice. It does not simply require researching a single point of foreign law, but instead, demands a survey of that country's entire system of criminal justice in search of the basic components of due process.

[16] *See Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting) (a criminal conviction "may result in tangible harms such as . . . loss of the right to vote or to bear arms"); *United States v. Allen*, 190 F.3d 1208, 1212 (11th Cir. 1999) ("conviction of a felony results in the loss of constitutional rights important to each United States citizen, such as the rights to vote, to bear arms, and to engage in a profession").

prosecutions, prosecutors, judges, defendants and defense attorneys can feel confident that before an individual's right to possess a firearm is abridged because of a prior conviction, the prior conviction will count only after the accused was given the full benefit of due process and fundamental fairness. To allow an otherwise lawful act to become illegal on the basis of anything less, would be antithetical to cherished American traditions and values.[17]

IV. THE STATUTORY EVOLUTION AND LEGISLATIVE HISTORY CONFIRM THAT "ANY COURT" MEANS A FEDERAL OR STATE COURT

A. When it Enacted the Gun Control Act (1968), Congress Understood "Convicted in Any Court" to Refer to Convictions in State and Federal Courts Only

The current provision on felon receipt and possession of firearms originated in two enactments passed in 1968, the Omnibus Crime Control and Safe Streets Act ("OCCSSA") and the Gun Control Act ("GCA"). The statutory language and committee reports of those enactments make clear the intent to disarm felons, who were considered to be persons who were

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[17] *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) ("owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm . . . ."). It is noteworthy that shortly after § 922(g)(1) was enacted, the ATF interpreted "any court" to mean only Federal and State courts. *See Winson*, 793 F.2d at 758-59. ATF reached this conclusion for essentially the same policy reasons made herein as likely factors in Congress' intent as well. ATF's early position is discussed in more detail in Part IV below.

convicted of Federal or State offenses. Foreign convictions were not included.

Title IV of the OCCSSA made it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to ship or transport a firearm in commerce, or to receive a firearm which had been shipped or transported in commerce. P.L. 90-351, 82 Stat. 225, 230-31 (1968), enacting 18 U.S.C. § 922(e), (f). However, it enacted the following definition: "The term 'crime punishable by imprisonment for a term exceeding one year' shall not include any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate." *Id.* at 228, enacting § 921(b)(3). No reason existed to refer to "Federal or State" offenses if foreign convictions counted.

Further, Title VII of the OCCSSA enacted 18 U.S.C. App. § 1202(a)(1), 82 Stat. 236, which explicitly recognized only Federal and State convictions:

> Any person who –
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .
>
> and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm, shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The GCA, passed later the same year, would supersede Title IV of the OCCSSA in its entirety and would amend Title VII. The House GCA bill, entitled the State Firearms Control

Assistance Act and numbered as H.R. 17735, repeated the OCCSSA's disqualification of a person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Report 1577, House Committee on the Judiciary, 90th Cong., 2d Sess., 2-3, 25 (1968). It referred to such persons as "felons." *Id.* at 15. The bill also repeated the exclusion from a disabling crime of "any Federal or State offenses" related to antitrust, trade, and similar offenses. *Id.* at 22.

The Senate bill, entitled the Gun Control Act and numbered as S. 3633, deleted the terms "punishable by imprisonment for a term exceeding one year" and worded the disqualification to refer to a person "who has been convicted in any court of a crime punishable as a felony . . . ." Report No. 1501, Committee on Judiciary, Senate, 90th Cong., 2d Sess., 61 (1968). It provided the following definition: "*The term 'felony' means, in the case of a Federal law, an offense punishable by imprisonment for a term exceeding one year, and, in the case of a State law, an offense determined by the laws of the State to be a felony.*" *Id.* at 56 (emphasis added).[18] Finally, the bill excluded from the term "crime punishable as a felony" "any Federal or State offenses" pertaining to antitrust, trade, and similar offenses. *Id.* at 56. Clearly, only American convictions counted.

It is noteworthy that the Senate version worded the prohibited category as a person convicted of a "felony" and defined that term in terms only of "Federal" and "State" law, and

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[18] The section-by-section analysis stated: "The definition of the term 'felony', as added by the committee, is a new provision. It means a Federal crime punishable by a term of imprisonment exceeding 1 year and in the case of State law, an offense determined by the laws of the State to be a felony." *Id.* at 31.

the Report explained that "a similar prohibition is contained in existing law." *Id.* at 35, 56.

The differences in the House and Senate bills were resolved by a conference committee. The House language would be adopted, but the conference report made clear that the difference was only in terminology and not in substance. It stated:

> Definition of crimes.- Both the House bill and the Senate amendment prohibited the shipment, transportation, and receipt of firearms and ammunition by persons under indictment for, or convicted of, certain crimes. . . . A difference between the House bill and the Senate amendment which recurs in the provisions described above is that the crime referred to in the House bill is one punishable by imprisonment for more than 1 year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony.
>
> Under both the House bill and the Senate amendment the crimes were defined to exclude Federal and State offenses relating to antitrust violations and similar business offenses. The conference substitute adopts the crime referred to in the House bill (one punishable by imprisonment for more than 1 year) but excludes from that crime any State offense not involving a firearm or explosive, classified by the laws of the State as a misdemeanor, and punishable by a term of imprisonment of not more than 2 years.

Gun Control Act of 1968, Conference Report, Report 1956, House Committee on the Judiciary, 90th Cong., 2d Sess., 28-29 (1968).

The Conference Report made no mention of any substantive difference in the meanings of the House and Senate versions. The term "any court" was intended to refer to any Federal or State court.

As finally enacted, Title I of the Gun Control Act extended its prohibitions to any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . ." P.L. 90-618, 82 Stat. 1213, 1220 (1968), enacting 18 U.S.C. § 922(g), (h). It also provided the following exclusion:

> The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

82 Stat. 1216, enacting § 921(a)(20).

Moreover, Title III of the GCA enacted 18 U.S.C. App. § 1202(c)(2), which stated: "'felony' means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less . . . ." 82 Stat. 1236. *See also* Conference Report, Report 1956, at 34. That clarified the scope of § 1202(a)(1), which was not amended and which prohibited firearm receipt to any person

who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . ."

Accordingly, in the 1968 legislation Congress intended to prohibit firearm receipt by persons convicted of felonies under Federal or State law. The Senate GCA bill explicitly said so. The House bill, which was enacted, was not considered to be substantively different. Indeed, its explicit exclusion of specified Federal and State offenses made no sense if foreign convictions were intended to be included. Section 1202(a)(1) also explicitly referred to Federal and State offenses only. Nothing in the statutory development or legislative history indicates that foreign convictions were included.

It is noteworthy that, not long after passage of the Gun Control Act, ATF interpreted "any court" to mean only Federal and State courts.[19] *United States v. Winson*, 793 F.2d 754, 759 (6th Cir. 1986), relates:

> In the 1974 interpretation by the Director of ATF's Technical Division, three reasons were given:
>
> 1. Foreign law does not, in the majority of instances, give the protections to our citizens that they are afforded under our system of justice.
>
> 2. There is difficulty in interpreting foreign law with respect to the specific offense charged.
>
> 3. There is extreme difficulty in obtaining adequate documentation of a foreign conviction.
>
> It seems likely that these same reasons motivated

[19] *See Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983) ("that early position . . . is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary").

Congress to include only Federal and State convictions.

B. In Enacting the Firearms Owners' Protection Act (1986), Congress Intended to Incorporate Prior Law, Under Which "Any Court" Referred to a Federal or State Court

The Firearms Owners' Protection Act ("FOPA") consolidated § 1202 with old § 922(g) into the current § 922(g). It did so by repealing 18 U.S.C. App. § 1201 *et seq.* and enacting the amended § 922(g) together with the definition in § 921(a)(20). FOPA, P.L. 99-308, 100 Stat. 449, 450, 452, 459 (1986). In passing FOPA, Congress intended that "any court" meant a Federal or State court.

The Senate Report noted that FOPA "repeals Title VI of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. app. 1201-1203). These provisions are merged into similar provisions in 18 U.S.C. 922 . . . ." Senate Report 98-583, 98th Cong., 2d Sess., 30 (1984).[20] The report noted that § 922 and § 1202 defined the prohibited classes inconsistently, and the FOPA bill "replaces these inconsistent rules with a straightforward and consistent one." *Id.* at 12. It did not, however, suggest that there was anything inconsistent about the "any court" language in § 922 and § 1202's reference to "a court

[20] There was no Senate report on FOPA the year it passed, but the above was the report on its predecessor bill. *NRA v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). Similarly, it was explained that the prior FOPA bill "repeals 18 U.S.C. sections 1201-03, *the provisions of which have been incorporated into the Gun Control Act* proper by the provisions of this act." Senate Report 97-476, 97th Cong., 2d Sess., 25 (1982) (emphasis added). That report otherwise paralleled the 1984 report. *Id.* at 19.

of the United States or of a State or any political subdivision thereof ."

The Senate Report also explained changes to the definition of "crime punishable by imprisonment for a term exceeding one year." Each one of those changes presuppose conviction by a Federal or State court, and no other:

> First, it makes the court, rather than the Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices." Second, it removes the exception relating to state firearms laws so that state misdemeanors punishable by two years of imprisonment or less would not be disabling crimes under any circumstances. Third, it requires that a "conviction" must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters.

Senate Report 98-583, at 7.

The first above change about the exclusion of business practices from disqualifying crimes, both in the GCA and what became FOPA, explicitly referred solely to "any Federal or State offenses." The second change referred to the treatment of "state misdemeanors." The third, referring to determining a "conviction" in accord with "the law of the jurisdiction,"

accommodated "state reforms." *Id.* The Report proceeded to mention a fourth change:

> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may possess it, would be corrected.

Senate Report 98-583, at 7.

Once again, the above concerned only Federal and State convictions. The reference to "a similar provision with respect to pardons in 18 U.S.C. app. 1202," related to § 1203(2), which exempted from the firearm prohibition "any person who has been pardoned by the President of the United States or the chief executive of a State." So too, the FOPA bill had in mind pardons, civil rights restorations, and expungements under Federal and State law only.

In Senate debate, the parts of § 922 and § 1202 described as inconsistent and as reconciled in the FOPA bill concerned the classes of prohibited persons, the acts of receipt and possession, and pardons and civil rights restorations. No one suggested that any inconsistencies existed in the "any court" and "any Federal or State offenses" references in those sections, and senators referred only to Federal and State courts and convictions.

Senator Hatch, for instance, remarked that "S. 49 grants authority *to the jurisdiction (State)* which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony." 131 Cong. Rec. S8689 (June 24, 1985) (emphasis added) (also inserting section-by-section analysis). *See also id.* at S9121 (July 9, 1985) (Sen. Hatch); S9128 (Sen. Sasser).

Particularly instructive was Senator Hatch's Comparison of Major Provisions of the bills. "Existing law" prohibited "persons convicted of crimes punishable by imprisonment for a term exceeding 1 year" from having firearms. *Id.* at S5353 (May 6, 1986). Under "S. 49 (Senate version)," the Hatch analysis stated: "*Same as existing law*, except that *Title VII would be* substantially repealed and its provisions *incorporated in the Gun Control Act*." *Id.* (emphasis added). Under "S. 49 (House version)," the analysis stated: "Repeals Title VII and *incorporates its provisions . . . into the Gun Control Act*." *Id.* (emphasis added). These explanations clearly imply that the "a court of the United States or of a State" language of Title VII was incorporated into the more concise "any court" language of the FOPA bill.

No House report existed on the FOPA bill as it was never reported from committee and came to the floor via a discharge petition. The provisions at issue here were uncontroversial and gave rise to no debate. *See* 132 Cong. Rec. H 1644 ff. (April 9, 1986), H 1741 ff. (April 10, 1986) (House debate).

The Bureau of Alcohol, Tobacco and Firearms prepared an analysis of the Senate FOPA bill, S. 49, which stated: "The bill would repeal most of Title VII and incorporate its provisions into the Gun Control Act." House Report 99-495, Judiciary Committee, 99th Cong., 2d Sess., 17 (1986). That report recommended passage of H.R. 4332 and rejection of FOPA

(H.R. 945), but no difference existed on the issue here.[21] Referring to the categories of disabilities in § 922 and Title VII, the report noted that H.R. 4332 "combines those provisions into a single subsection." *Id.* at 28. It also pointed out that this bill was no different in this regard than S. 49 and H.R. 945. *Id.* at 16.

As finally enacted, 18 U.S.C. § 922 (g)(1) made it unlawful for anyone "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to possess any firearm . . . ." Section 921(a)(20) defined that term to exclude "any Federal or State offenses" related to regulation of business practices and "any State offense" which is a misdemeanor punishable by imprisonment of two years or less. It defined "a conviction of such a crime" as based on "the law of the jurisdiction in which the proceedings were held," which referred to State law.[22] Finally, it excluded expungements, pardons, and restorations of civil rights which have a basis only in Federal or State law.

C. The Brady Act Further Clarifies that "Convicted in Any Court" Refers to Convictions by Federal and State Courts

The Brady Handgun Violence Prevention Act, P.L. 103-

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[21] On the House floor, H.R. 4332 was defeated, while the Volkmer substitute, H.R. 945, was passed as the FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Judiciary Committee bill] was laid on the table." 132 Cong. Rec. H 1753, 1757 (April 10, 1986).

[22] *See* remarks of Senator Hatch above, 131 Cong. Rec. S8689 (June 24, 1985).

159, 107 Stat. 1536 (1993), clarifies that the terms "convicted in any court" refer to convictions rendered by Federal and State courts. The Brady Act established procedures for background checks, enhanced the accuracy of criminal records, and set up procedures for correction of such records.

The Interim Provision of the Brady Act, which was in force for five years, keyed transfer of a handgun to lack of any record "that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law." 18 U.S.C. § 922(s)(1)(A). The transferee was required to make a statement, *inter alia*, that he "has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year." § 922(s)(3)(B)(I).

State and local chief law enforcement officers were ordered to ascertain "whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The licensee was prohibited from disclosing any non-public information in this process other than to the transferee or law enforcement, "or pursuant to the direction of a court of law." § 922(s)(5). Obviously, this meant a Federal or State court, not any court in the world.

The Permanent Provision of the Brady Act, which became effective in 1998, tied transfer of a firearm to a background check revealing that "receipt of a firearm would not violate section 922 (g) or (n) or State law." § 922(t)(2). It established the National Instant Criminal Background Check System (NICS). The Attorney General was ordered to establish computer systems for communication between NICS and State criminal records systems, and to determine a timetable for each State to be able to provide criminal records on-line. Brady Act,

§ 103(a). The Attorney General was ordered to expedite "the upgrading and indexing of State criminal history records in the Federal criminal records system maintained by the Federal Bureau of Investigation." *Id.*, § 103(c)(2). Conspicuously absent is any directive to communicate with foreign jurisdictions.

That only Federal and State convictions are pertinent is made clear in § 103(g), which concerns the correction of erroneous information. It states that if NICS finds that "receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law," the prospective transferee may request the reasons from, and submit corrective information, to the Attorney General. The Attorney General is required to "correct all erroneous Federal records relating to the prospective transferee and *give notice of the error to any Federal department or agency or any State that was the source of such erroneous records.*" *Id.* (emphasis added). The Attorney General is not required to give notice to any foreign jurisdictions because foreign records are not considered at all.

The Brady Act also enacted 18 U.S.C. § 925A, which provides that "any person denied a firearm pursuant to subsection (s) or (t) of section 922" due to erroneous information provided by a State or political subdivision thereof, or by NICS, "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be." Once again, only Federal and State criminal records are pertinent, and thus only those records may be corrected. No procedure is included for review and correction of a foreign record, whether by the Attorney General or an

American court, because no such record is pertinent to whether a person may lawfully receive a firearm.

Section 925A concludes: "In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." As in the provision at issue here, the term "court" refers only to a Federal or State court. This provision illustrates the fallacy of reading the term "court" to refer to foreign courts.

In sum, the Brady Act demonstrates Congress' intent that the term "court" as used in the Gun Control Act means a Federal or State court. Provision was made to conduct background checks only in Federal and State records. Procedures for correction of records refer only to Federal and State records. Records of convictions by foreign courts are irrelevant.

V. BOTH CONGRESSIONAL INTENT AND THE RULE OF LENITY MANDATE THAT THE STATUTE BE NARROWLY CONSTRUED TO EXCLUDE FOREIGN CONVICTIONS

The statute must be narrowly construed to exclude foreign convictions. First, Congress deemed constitutional rights to be at stake and would not have intended that these rights be subject to forfeiture other than through the procedures of American law. Second, given the ambiguity, the related principles of the rule of lenity and avoidance of vagueness mandate a narrow construction.

FOPA enacted Findings indicating Congress' understanding that firearm possession is a fundamental right and is protected by both substantive and procedural guarantees in the Constitution. These Findings counsel a narrow interpretation of

the Act's prohibitions should any ambiguity arise. Section 1(b) of FOPA, 100 Stat. 449, declares:

> CONGRESSIONAL FINDINGS--The Congress finds that–
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."[23]

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[23] Congress previously interpreted the Second Amendment to guarantee individual rights. Freedmen's Bureau Act, § 14, 14 Stat. 173, 176-77 (1866) ("the right . . . to have full and equal benefit of all laws and

Given the deference accorded by Congress to the Second Amendment, it is highly doubtful that Congress intended that "any court" meant any court other than State and Federal courts. The world is filled with dictatorships and governments which fail to recognize fundamental fairness in their criminal justice systems. FOPA's Findings imply that Second Amendment rights may be forfeited only by the procedures which are followed in American law.

While the meaning of the Second Amendment is in dispute,[24] that issue is not before this Court.[25] Instead, this Court should defer to Congress' Findings that firearm possession is a constitutional right which may not be taken away unless the law

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proceedings concerning personal liberty, personal security, and . . . [estate], including the constitutional right to bear arms"); Property Requisition Act, P.L. 274, 55 Stat., pt. 1, 742 (1941) (Act may not be construed to requisition or register "firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any individual to keep and bear arms").

[24] *See United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (individual rights view); *accord*, Brief of the United States in Opposition to certiorari (at 20) (United States agrees that Second Amendment protects individual right to possess firearms). *But see Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003) ("collective rights" view), *reh. denied*, 328 F.3d 567, 568 (9th Cir. 2003) (*see* dissents), *cert. denied*, 124 S. Ct. 803 (2003).

[25] "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring). "As the parties did not raise this argument, however, we need not consider it here." *Id.* at 939.

clearly so provides. Indeed, prudence demands that the issue may be avoided by simply construing the statute in accord with the general rule intended by Congress, i.e., that a prohibition on firearm possession be interpreted narrowly.

Moreover, the statute must be narrowly construed to avoid unconstitutional vagueness. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See Jones v. United States*, 526 U.S. 227, 251 (1999) ("the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions.").

This is a classic case for application of the rule of lenity, in which "doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 347-48 (1971). As *Bass* explained:

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. . . . First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. (citations and quotation marks omitted).

Bass concluded that "Congress has not 'plainly and unmistakably' . . . made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." *Id.* at 348-49. Nor has Congress "plainly and unmistakably" made it a crime for a person never convicted of a felony by a Federal or State court to possess a gun.

CONCLUSION

This Court should reverse the judgment of the court of appeals and vacate the conviction.

Respectfully submitted,

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No. 03-750

In the Supreme Court of the United States

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 922(g)(1) of Title 18, United States Code, renders it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. The question presented is:

Whether the statutory reference to convictions entered in "any court" includes convictions entered by the courts of foreign countries.

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In the Supreme Court of the United States

No. 03-750

GARY SHERWOOD SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 333 F.3d 425. The district court's opinion (Pet. App. 8a-40a) is reported at 183 F. Supp. 2d 755.

JURISDICTION

The court of appeals entered its judgment on June 23, 2003. A petition for rehearing was denied on July 23, 2003 (Pet. App. 41a-42a). On October 15, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 20, 2003, and the petition was filed on November 17, 2003. The petition for a writ of certiorari was granted on March 29, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in an appendix to this brief.

STATEMENT

A federal grand jury returned a four-count indictment against petitioner that charged him with making a false statement intended or likely to deceive a licensed firearms dealer with respect to the sale of a firearm, in violation of 18 U.S.C. 922(a)(6), and with possessing an SWD Cobray pistol, a Browning .380 caliber pistol, and firearm ammunition, in or affecting interstate commerce, while having been previously convicted of an offense punishable by imprisonment for a term exceeding one year, each in violation of 18 U.S.C. 922(g)(1). Following a conditional plea of guilty, petitioner was convicted in the United States District Court for the Western District of Pennsylvania on one count of possessing an SWD Cobray pistol, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to eight months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed.

1. In December 1992, petitioner shipped from the United States to Osaka, Japan, via cargo airplane, a 19-gallon electric water heater, ostensibly as a present for "his Papa-san in Okinawa." 3 Pet. C.A. App. 507-510, 521-525, 598. Small had sent two other water heaters to Japan earlier that year. *Id.* at 525-527. Considering it unusual for an individual to "go out of his way to bring a water tank from the U.S. as a present," *id.* at 598-599, Japanese Customs officials X-rayed the water heater upon its arrival and discovered firearms packaged inside. When petitioner appeared at the airport to

accept delivery, he confirmed that the water heater was his, whereupon Customs officials served him with a search warrant. Upon opening the water heater, Customs officials discovered two rifles wrapped in black tape, eight pistols, and 410 ammunition shells. *Id.* at 603-604.

The Japanese government indicted petitioner on multiple counts of violating Japan's Guns and Knives Control Law, the Explosives Control Law, and the Customs Law. 2 Pet. C.A. App. 261a-262a. His criminal trial before the Naha District Court in Japan was public and was conducted before three impartial judges. Petitioner was present, the proceedings were translated, and he was afforded the assistance of counsel, who cross-examined witnesses and made a closing argument.[1] The judges also actively questioned the prosecution's witnesses. See, *e.g.*, 3 Pet. C.A. App. 610-611, 685-688. Following trial, petitioner was convicted on all counts. Pet. App. 2a. Each offense was punishable by imprisonment for a term exceeding one year. *Ibid.* Petitioner received a sentence of five years of imprisonment, to be followed by eighteen months of parole. *Id.* at 10a n.3.[2]

2. Within a week of completing parole for his Japanese convictions, petitioner purchased an SWD Cobray nine-millimeter handgun from a firearms dealer in Pennsylvania. Pet. App. 2a n.1; 1 Pet. C.A. App. 47a-51a; Govt. C.A. Br. 6. Federal law required petitioner

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[1] 3 Pet. C.A. App. 554, 562, 580, 587-589, 596, 608-610, 614-615, 621, 626, 631-635, 647-648, 652, 656, 674, 680, 684-685, 696, 699, 704, 711-712; Gov't C.A. Br. 41.

[2] An English translation of the transcript of the entire Japanese trial was submitted to the district court, Pet. App. 29a, and is included in the record, see 2 & 3 Pet. C.A. App. 251a-713a.

to provide truthful background information on a federal form before making that purchase. 18 U.S.C. 922(s)(1)(A)(i)(I) and (3)(B). In completing the form, petitioner answered "no" to the question "[h]ave you been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?" Gov't C.A. Br. 6. A subsequent search, pursuant to warrant, of petitioner's apartment uncovered a Browning .380 caliber pistol and more than 300 rounds of ammunition. 1 Pet. C.A. App. 50a-51a.

3. On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned a four-count indictment against petitioner, charging him with one count of making a false statement intended or likely to deceive a licensed firearms dealer, in violation of 18 U.S.C. 922(a)(6), and with three counts of possessing firearms or ammunition in or affecting interstate commerce while having been previously convicted in Japan of an offense punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1). See Pet. App. 8a-9a; Pet. C.A. App. 47a-51a.

Petitioner moved to dismiss the indictment on the ground that Section 922(g)(1)'s ban on the possession of firearms by persons convicted "in any court," as well as Section 922(s)(3)(B)'s background question about prior convictions "in any court," refer to domestic convictions only. Pet. App. 10a. Petitioner also argued that his Japanese convictions had been obtained through fundamentally unfair procedures. *Ibid.*

The district court denied the motion. Pet. App. 8a-40a. The district court first ruled that the phrase "any court" in Section 922(g)(1) embraced all courts, domestic and foreign. *Id.* at 11a-16a. The court reasoned that "'[a]ny' court means any court and there is nothing

in the plain and unambiguous language of Section 922 indicating that Congress intended to exclude foreign convictions from such a broad term." *Id.* at 16a.

The district court also rejected petitioner's claim that his convictions were the product of fundamentally unfair proceedings in Japan. Pet. App. 29a-39a. The court first noted that the Japanese Constitution grants criminal defendants many of the same rights and protections they enjoy in this country. *Id.* at 30a-32a. The court then rejected petitioner's objections to the trial proceedings, noting both that petitioner failed to identify any actual prejudice arising from the alleged errors and that there was "overwhelming evidence" against him. *Id.* at 39a; see *id.* at 33a-38a. The court concluded that petitioner's convictions were "sufficiently consistent with our concepts of fundamental fairness * * * that we may have confidence in the reliability of the fact-finding process." *Id.* at 39a.

4. The court of appeals affirmed. Pet. App. 1a-7a. Agreeing with decisions of the Fourth and Sixth Circuits, the court concluded that "foreign convictions, generally, can count as predicate offenses for the purposes of § 922." *Id.* at 3a n.2 (citing *United States* v. *Atkins* 872 F.2d 94 (4th Cir.), cert. denied, 493 U.S. 836 (1989), and *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986)).

The court of appeals also rejected petitioner's claim that the Japanese proceedings were fundamentally unfair. Pet. App. 4a-6a. The court first held that, before recognizing a foreign conviction as a predicate offense under Section 922(g), the court "must satisfy itself that the foreign conviction comports with our notions of fundamental fairness as required by the Due Process Clause." *Id.* at 4a. To that end, the court of appeals applied the factors for recognition of foreign

judgments identified by the Restatement (Third) of Foreign Relations Law of the United States (1987) (Restatement):

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
>
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
>
> (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.
>
> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
>
> (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
>
> (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (c) the judgment was obtained by fraud;
>
> (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
>
> (e) the judgment conflicts with another final judgment that is entitled to recognition; or
>
> (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

1 Restatement § 482, at 604. Applying that framework, the court of appeals concluded that "there were no grounds for non-recognition of the Japanese conviction as the predicate offense to [petitioner's] § 922(g)(1) conviction." Pet. App. 6a.[3]

SUMMARY OF ARGUMENT

The plain text of Section 922(g)(1) makes convictions entered in foreign courts proper predicates for the federal bar on firearms possession. Congress directed that any person who has been convicted in "any court" of a crime punishable by more than one year in prison may not possess firearms, and the ordinary understanding of "any court" includes foreign courts. The natural meaning of the modifier "any" denotes the comprehensive inclusion of all courts capable of imposing the requisite convictions. In addition, as this Court has repeatedly recognized, Congress chose the language of Section 922(g)(1) with care and intended it to mean exactly what it says. Congress's choice of the unqualified "any court" language in Section 922(g)(1) stands in sharp contrast to references elsewhere in the gun control law that are expressly limited to "United States" and "State" courts. Furthermore, Congress has twice amended the gun control law to delete language limiting disqualifying convictions to those entered by courts of the United States or the States.

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[3] Petitioner has not sought this Court's review of that portion of the court of appeals' judgment concluding that his convictions were obtained through fundamentally fair procedures. Pet. i, 3 n.1; Pet. Br. 4 n.3.

The structure of the gun control law and the specialized pattern of legislative usage of the phrase "conviction in any court" underscore that Congress meant "any" to encompass all convictions for qualifying offenses, whether foreign or domestic. Other provisions of the gun control law evidence that Congress was specifically concerned with the international and cross-border trafficking of firearms, as well as with keeping guns out of the hands of persons if the domestic or foreign consequences of their conduct renders their possession of firearms an unacceptable risk to the American public. Moreover, a review of federal law reveals that Congress uses the phrase "conviction in any court" sparingly, reserving it for contexts, such as the possession of biological weapons or explosive materials, where recognizing convictions entered by foreign courts makes sense and where ignoring those convictions could have dire consequences.

In addition, excluding foreign convictions would frustrate the central purpose of Section 922(g)(1)'s prohibition on the possession of firearms. Congress enacted that prohibition to keep firearms out of the hands of potentially dangerous persons—those whose past conduct evidenced that their possession of firearms could pose a risk to public safety. That threat does not dissipate when those individuals cross the border. A foreign murderer is just as dangerous as a domestic one.

At bottom, petitioner's argument is that "any" should not mean "any" because that reading might produce occasional anomalies in practice and because some foreign court systems employ criminal procedures less protective of defendant's rights than the United States does. But, while giving "any court" its natural reading as including foreign courts could result in the disparate

coverage of those convicted of certain business crimes depending on the locus of their misconduct, worse anomalies arise under petitioner's reading of the statute. Petitioner would allow foreign murderers, rapists, and armed robbers to purchase and possess as many firearms as they want, while those convicted domestically of mailing a lottery ticket, 18 U.S.C. 1302, could not. Petitioner's position also would require the Court to conclude that, while Congress sought to curb importers', manufacturers', and dealers' trafficking of firearms to terrorists, Congress meant to impose no bar on the domestic acquisition and possession of firearms by convicted terrorists themselves. In any event, legislating necessarily entails line-drawing. A criminal defendant's ability to hypothesize unusual applications of the law—applications that are not remotely implicated in his case—provides no sound basis for ignoring explicit statutory text.

Second, attaching domestic consequences to the *fact* of a foreign conviction is not unusual and it does not require that the foreign penal system mirror the constitutional processes afforded criminal defendants in the United States. As the Court has recognized, Section 922(g)(1) is, in essence, a civil firearms disability that is enforced through the criminal system. The fact of a conviction is enough to trigger that disability, regardless of whether the processes used to obtain the conviction comport with constitutional dictates, because the fact of conviction alone is a reasonable proxy for a heightened risk arising from the possession of firearms. The Court held as much in *Lewis* v. *United States*, 445 U.S. 55 (1980), when it ruled that state convictions may support a Section 922(g)(1) prosecution regardless of whether they are susceptible to collateral attack as unconstitutional. If funda-

mentally unfair and unconstitutional state court convictions can provide a predicate for Section 922(g)(1)'s firearms bar, nothing in law or logic supports ignoring petitioner's fundamentally fair conviction in Japan.

ARGUMENT

THE FEDERAL PROHIBITION ON THE POSSESSION OF FIREARMS BY PERSONS CONVICTED IN "ANY COURT" APPLIES TO PERSONS CONVICTED OF CRIMES IN FOREIGN COURTS

A. The Natural Meaning Of "Any Court" Includes Foreign Courts

Determining whether Section 922(g)(1)'s prohibition on the possession of firearms by persons convicted in "any court" reaches convictions in foreign courts "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); see also *Lewis* v. *United States*, 445 U.S. 55, 60 (1980) ("[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself.") (citations omitted).

1. The natural meaning of "any court" includes foreign courts because "any" is an all-encompassing and deliberately inclusive word that reaches all members of a class. In construing a parallel provision of the same gun control statute at issue here, the Omnibus Crime Control and Safe Streets Act of 1968 (1968 Omnibus Act), Pub. L. No. 90-351, 82 Stat. 226, this Court held that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1,

5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)) (construing 18 U.S.C. 924(c)(1)).[4]

Section 922(g)(1) thus "could not be more plain," *Lewis*, 445 U.S. at 65, in its intent to cover convicted felons broadly without geographic limitation. In *Lewis*, in construing a parallel prohibition in Title VII of the 1968 Omnibus Act on the possession of firearms by "any person * * * who has been convicted" of a felony, 18 U.S.C. App. 1202(a)(1) (1976), the Court stressed that the prohibition "is directed unambiguously at any person who 'has been convicted,'" regardless of whether their convictions were subject to collateral attack. 445 U.S. at 60. Here, as in *Lewis*, "[n]o modifier is present,

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[4] See also *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-131 (2002) ("Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."); *Brogan* v. *United States*, 522 U.S. 398, 400-401 (1998) ("any false, fictitious or fraudulent statements" includes false statements of all kinds and is not restricted to such statements "that pervert governmental functions"); *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); *United States* v. *Atkins*, 872 F.2d 94, 96 (4th Cir.) (in Section 922(g)(1), "'[a]ny' is hardly an ambiguous term, being all inclusive in nature"), cert. denied, 493 U.S. 836 (1989); 1 *The Oxford English Dictionary* 378 (1933) ("any" defined as "indifference as to the particular one or ones that may be selected"; embracing all "no matter which" and "of whatever kind"). Petitioner's reliance (Br. 22-23) on *Nixon* v. *Missouri Municipal League*, 124 S. Ct. 1555 (2004), misses the mark. There, the Court gave the statutory language a particularly narrow construction because the legislation "threaten[ed] to trench on the States' arrangements for conducting their own governments," and thus Congress was required to express its intent with particular clarity. *Id.* at 1565 (citing *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991)). No clear-statement rule applies in this context.

and nothing suggests any restriction on the scope of" the phrase "any court" that would limit its reference to domestic courts. *Ibid.* Likewise, in *Barrett* v. *United States*, 423 U.S. 212 (1976), the Court concluded that the same provision at issue here—then codified as 18 U.S.C. 922(h) (1970)—was "directed unrestrictedly at the felon's receipt of any firearm that 'has been' shipped." 423 U.S. at 216. That unqualified statutory language, the Court held, "is without ambiguity." *Ibid.*; see also *Gonzales*, 520 U.S. at 5; *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111 (1983).[5]

2. Congress's use of the expansive phrase "any court" in Section 922(g)(1) contrasts with other parts of the same law that are limited to convictions, prosecutions, or prohibitions under state or federal law. See, *e.g.*, 18 U.S.C. App. 1202(a)(1) (1970) (banning possession, receipt, or transport of a firearm by any person who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony") (repealed by the 1986 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459).[6]

[5] For that same reason, courts have held that Section 922(g)(1)'s reference to "any court" is not limited to Article III courts and, in fact, includes military courts. See *United States* v. *Martinez*, 122 F.3d 421, 424 (7th Cir. 1997); *United States* v. *MacDonald*, 992 F.2d 967, 969-970 (9th Cir. 1993); cf. *United States* v. *Lee*, 428 F.2d 917, 920 (6th Cir. 1970), cert. denied, 404 U.S. 1017 (1972).

[6] See also 18 U.S.C. 921(a)(15) (defining a "fugitive from justice," who is proscribed from possessing firearms, 18 U.S.C. 922(g)(2), as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony"); 18 U.S.C. 921(a)(20) (excluding certain "Federal or State offenses" from the definition of "crime punishable by imprisonment for a term exceeding one year"); 18 U.S.C. 921(a)(33)(A) (defining a "misdemeanor crime of domestic violence" by reference to "Federal or State law"); 18 U.S.C. 924(e)(2) (defining a "serious drug offense," which can trigger an enhanced sentence, by reference to identified federal laws or "State law").

That legislative pattern demonstrates that, when Congress wishes to restrict the gun control law's operation to state and federal crimes, it says so explicitly.

The absence of similar narrowing language in Section 922(g)(1) underscores Congress's intent to reach all convictions, whether foreign or domestic. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The Court has repeatedly invoked that principle of statutory construction to interpret parallel provisions of the gun control law. See *Gonzales*, 520 U.S. at 5; *Custis* v. *United States*, 511 U.S. 485, 492 (1994) (interpreting 18 U.S.C. 924(e)); *Barrett*, 423 U.S. at 217.

3. This Court has long recognized that Congress, in Section 922(g), "was reaching far and was doing so intentionally." *Dickerson*, 460 U.S. at 116. In *Barrett*, *supra*, the Court noted the detailed precision with which Congress crafted the provision containing the forerunner to Section 922(g). See 423 U.S. at 216-217. "Congress knew the significance and meaning of the language it employed" in Section 922(g) in particular. *Id.* at 217. In fact, "[i]t is obvious" that the language employed "throughout * * * [was] chosen with care," and that the provisions represented "a carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); see

also *Dickerson*, 460 U.S. at 116. Thus, by all indications, Congress's unqualified prohibition on the possession of firearms by persons who have been convicted "in any court" "means exactly what it says." *Barrett*, 423 U.S. at 216 (finding coverage of intrastate acquisitions of firearms previously transported in interstate commerce). "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *Huddleston* v. *United States*, 415 U.S. 814, 825 (1974).

4. Finally, the natural understanding of "any court" is reflected in how the law has been interpreted and administered by those charged with its day-to-day enforcement. Congress charged the Secretary of the Treasury (now, the Attorney General) with issuing "such rules and regulations as are necessary to carry out the provisions of" Section 922 and the companion sections of the gun control law. 18 U.S.C. 926(a). That authority was delegated to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). See 37 Fed. Reg. 11,696 (1972); 28 C.F.R. 0.133.[7] In 1987, ATF promulgated a regulation that interpreted the phrase "crime punishable by imprisonment for a term exceeding 1 year" to include "[a]ny Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. 478.11; see 52 Fed. Reg. 2048 (1987).[8]

[7] The Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(c)(1) and (2), 116 Stat. 2135, transferred, with certain exceptions not relevant here, the "authorities, functions, personnel, and assets" of ATF from the Department of the Treasury to the Department of Justice.

[8] Petitioner's reliance (Br. 36) on a 30-year-old unpublished memorandum from ATF's Technical Division, which suggested that foreign convictions are not covered, is misplaced. That purely internal document, unlike the regulation cited above, did not purport to provide to the public an official interpretation of the statute by ATF. See *United States* v. *Winson*, 793 F.2d 754, 758-759 & n.4 (6th Cir. 1986).

More recently, the National Instant Criminal Background Check System, a computerized system designed to search criminal record systems and identify individuals who are disqualified from receiving or possessing firearms, has begun to implement that interpretation on a practical level. The system includes the records of the National Crime Information Center and the Interstate Identification Index. FBI, Dep't of Justice, *National Instant Criminal Background Check System* (Jan. 2004). While the coverage is far from comprehensive, those systems include some Canadian, British, German, and Italian criminal history records. And as computerization expands worldwide, the number of foreign conviction records included in the system will expand. Furthermore, whenever a background check is run on an alien, the system automatically initiates a search of the records of the Department of Homeland Security's Immigration and Customs Enforcement, which may include information about foreign criminal convictions, see 8 U.S.C. 1101(a)(43), 1158(b)(2)(A)(iii), 1182(a)(2)(A)(i) (II), 1231(b)(3)(B)(iii).

B. Section 922(g)(1)'s Purpose Of Keeping Firearms Out Of The Hands Of Potentially Dangerous Persons Requires The Recognition Of Foreign Convictions

The "obvious breadth of the language" employed by Congress comports with Congress's "expansive legislative approach" to the "problem of firearm abuse by felons." *Lewis*, 445 U.S. at 61. Congress intended "to impose a firearms disability on *any* felon based on the

fact of conviction." *Id.* at 62 (emphasis added); see *id.* at 64. Accordingly, in enacting Section 922(g)(1) and its counterpart provisions of the gun control law, "Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Dickerson*, 460 U.S. at 112 (internal quotation marks and citation omitted). Indeed, "[t]he principal purpose of the federal gun control legislation * * * was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston*, 415 U.S. at 824.[9]

[9] See also *Caron* v. *United States*, 524 U.S. 308, 315 (1998) ("Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by States."); *Dickerson*, 460 U.S. at 119 ("Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them."); *Scarborough*, 431 U.S. at 573 (noting congressional purpose to keep firearms away from those "whose prior behaviors have established their violent tendencies") (quoting 114 Cong. Rec. 14,773-14,774 (1968) (Sen. Long)); 114 Cong. Rec. at 16,298 (Rep. Pollock) ("The overall thrust is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner."); *id.* at 13,220 (Sen. Tydings) (law is concerned with "any person who has a criminal record"); *id.* at 14,773 (Sen. Long) (law is concerned with "persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous"); *id.* at 21,784 (Rep. Celler) ("This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons."); see generally Tracey A. Basler, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 New Eng. L. Rev. 147 (Fall 2002).

The prohibition of firearms possession by persons who have been convicted of serious crimes abroad directly advances Congress's legislative effort to stem the "general availability [of firearms] to those whose possession thereof was contrary to the public interest," *Huddleston*, 415 U.S. at 824, and to keep "these lethal weapons out of the hands of criminals * * * and other persons whose possession of them is too high a price in danger to us all to allow," *id.* at 825 (quoting 114 Cong. Rec. 13,219 (1968) (Sen. Tydings)). Whether entered abroad or domestically, a criminal conviction for a felony serves as a reasonable indication that the person is "too much of a risk to be allowed firearms privileges." *Dickerson*, 460 U.S. at 116; see *id.* at 120 ("[S]uch convictions provide a convenient, although somewhat inexact, way of identifying 'especially risky people.'") (quoting *United States* v. *Bass*, 404 U.S. 336, 345 (1971)). "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Lewis*, 445 U.S. at 66. The same is true of a criminal conviction entered by a foreign government.

In light of Congress's broad public-safety purpose, this Court has construed parallel provisions of the gun control law expansively to reach (i) "*all* types of sales or dispositions," *Huddleston*, 415 U.S. at 825 (emphasis added); (ii) *all* convictions, regardless of whether they are subject to collateral attack or expungement, *Lewis*, 445 U.S. at 60-61; *Dickerson*, 460 U.S. at 119-120; (iii) *all* possible manifestations of "convicted" status, including guilty pleas, *Dickerson*, 460 U.S. at 114; (iv) *all* terms of imprisonment, whether state or federal,

Gonzales, 520 U.S. at 5-8; (v) *all* purchases of firearms, even if not directly in interstate commerce, *Barrett*, 423 U.S. at 216-217; (vi) *all* acts of possession of firearms, even if not directly in interstate commerce, *Scarborough*, 431 U.S. at 571; and (vii) *all* convictions, even if the defendant had his civil rights restored under the law of another jurisdiction, *Beecham* v. *United States*, 511 U.S. 368, 372-373 (1994); see also *Caron* v. *United States*, 524 U.S. 308, 314-316 (1998) (state law authorization to possess rifles or shotguns insufficient). Congress's deliberate choice of the phrase "any court" should be afforded a similarly comprehensive scope, in accord with Congress's unqualified purpose of "deny[ing] *every* assassin, murderer, thief and burglar of the right to possess a firearm in the future." *Lewis*, 445 U.S. at 63 (quoting 114 Cong. Rec. at 14,773 (Sen. Long)) (emphasis added).

C. The Structure And Context Of The Gun Control Law Confirm That "Any Court" Includes Foreign Courts

1. The overall statutory context and structure confirm that Congress's effort to restrict access to firearms by potentially dangerous persons was intended to take into account the risk evidenced by individuals' conduct abroad. In addition to prohibiting the possession and receipt of firearms by felons, Section 922(g) bars aliens who are "illegally or unlawfully in the United States" or here on a non-immigrant visa, and individuals who have renounced their United States citizenship from possessing, receiving, or transporting firearms. 18 U.S.C. 922(g)(5) and (7). Those categories demonstrate Congress's awareness of the risks posed by the international fluidity of gun purchases and transfers and the dangers posed by individuals coming

into the United States from abroad and purchasing firearms.[10]

In addition, in defining the importers, manufacturers, and dealers whose activities are covered by the Act and who are subject to its criminal prohibitions, Congress made it easier to establish coverage for "a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." 18 U.S.C. 921(a)(22); see also 18 U.S.C. 921(a)(21). Congress then defined "terrorism" as:

> activity, directed against United States persons, which—
>
> (A) is committed by an individual who is not a national or permanent resident alien of the United States;
>
> (B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

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[10] That the dangers posed by individuals who engage in gun trafficking across national boundaries was a focus of Section 922 is documented by the fact that Section 922 references "foreign commerce" 23 different times and "importer" 34 times. See also 18 U.S.C. 924(m) (2000), as amended by Pub. L. No. 108-174, § 1(2), 117 Stat. 2481 (2003); 1968 Omnibus Act, Pub. L. No. 90-351, § 901(a)(1) and (7), 82 Stat. 225, 226 (congressional finding that "there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce," and that "the United States has become the dumping ground of the castoff surplus military weapons of other nations"); cf. *United States* v. *Kole*, 164 F.3d 164, 175 (3d Cir. 1998) ("We do not think that Congress enacted a law that was intended to reach persons involved in international drug trafficking and then limited enhanced penalties to those persons who had previously been convicted in a court in the United States."), cert. denied, 526 U.S. 1079 (1999).

(C) is intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

18 U.S.C. 921(a)(22).[11] This provision makes explicit Congress's intent to regulate and proscribe the firearms activities of persons within the United States based on their criminal conduct and the consequences of their conduct outside the United States. In light of Congress's manifest concern with the transnational threat of gun trafficking, Section 922(g)(1)'s reference to convictions "in any court" should be given the full scope denoted by its text.

2. Congress, as a matter of legislative practice, has limited use of the unqualified phrase "convicted in any court" to contexts where its natural meaning—embracing convictions in both domestic and foreign courts—comports with the congressional design. For example, Section 817 of the USA PATRIOT ACT, Pub. L. No. 107-56, Title VIII, 115 Stat. 386, which was enacted in the wake of the September 11, 2001, terrorist attacks on the United States, precludes persons who have been "convicted in any court" of a crime punishable by imprisonment for more than one year from possessing biological weapons. § 817(2), 115 Stat. 386, as amended by the Public Health Security

[11] See also 1968 Omnibus Act, Pub. L. No. 90-351, § 901(a)(8), 82 Stat. 226 (congressional finding that gun trafficking in interstate and foreign commerce has allowed weapons "to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern").

and Bioterrorism Preparedness Response Act of 2002, Pub. L. No. 107-188, § 231(a)(4), 116 Stat. 660 (to be codified at 18 U.S.C. 175b(d)(2)(B)). Likewise, 18 U.S.C. 842(d)(2) and 842(i)(1) prohibit persons who have been "convicted in any court" of a crime punishable by imprisonment for more than one year from possessing, shipping, transporting, or receiving explosive materials. Given the potentially devastating consequences of putting biological weapons or explosive materials in the hands of the wrong person, Congress's choice of statutory language that covers both foreign and domestic convictions makes sense.[12] And where the operation of a criminal statute is "not logically dependent on the[] locality" of the triggering conduct, neither Congress nor this Court has "thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922).[13]

[12] The three other statutes in which the phrase "convicted in any court" appears similarly support the coverage of both domestic and foreign convictions. See 20 U.S.C. 6736(d)(1)(A) (Supp. I 2001) (federal limitations on the liability of teachers to lawsuits do not apply to conduct arising from any "act of international terrorism * * * for which the defendant has been convicted in any court"); 21 U.S.C. 206 (regulation applying to consular districts in China); 42 U.S.C. 14503(f)(1)(A) (federal limitations on the liability of volunteers to lawsuits do not apply to conduct arising from any "act of international terrorism * * * for which the defendant has been convicted in any court"). By contrast, several other statutory provisions, including one within the gun control law itself, refer to convictions entered "in any court of the United States" or of the States. *E.g.*, 18 U.S.C. 930(g)(3); 10 U.S.C. 986(c)(1); 15 U.S.C. 8.

[13] See also *Maul* v. *United States*, 274 U.S. 501, 510-511 (1927); *Lloyd* v. *American Export Lines, Inc.*, 580 F.2d 1179, 1187-1190 (3d Cir.) (admitting record of a Japanese conviction under Federal

D. The Exclusion Of Certain Federal And State Business Crimes From The Ban On Gun Possession By Criminals Supports The Coverage Of Foreign Convictions

Petitioner places great weight (Br. 17-19) on a definitional provision, which provides that the phrase "crime punishable by imprisonment for a term exceeding one year" does not include

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 921(a)(20).[14] That reliance is misplaced, for at least three reasons.

First, if "any court" referred exclusively to federal and State courts, then there would have been no reason for Congress to include "Federal or State" as modifiers to identify which business crimes were excluded in Section 921(a)(20)(A). Likewise, there would have been no need to include the modifier "State" for the misdemeanor offenses excluded in Section 921(a)(20)(B).[15]

Rule of Evidence 803(22), even though Congress made no specific reference in that rule to convictions obtained in foreign countries), cert. denied, 439 U.S. 969 (1978).

[14] Congress separately defined "State" to include "the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone)." 18 U.S.C. 921(a)(2).

[15] The government is aware of no federal offenses that, although classified as misdemeanors, are punishable by more than one year but less than two years in prison. See 18 U.S.C. 3581(b)(6)-(8); cf.

This Court has refused time and again to treat statutory text "essentially as surplusage—as words of no consequence." *Ratzlaf* v. *United States*, 510 U.S. 135, 140 (1994). That rule applies with particular force to the construction of criminal laws. *Id.* at 140-141 ("Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."). That Congress considered it necessary to restrict the exceptions to "Federal" and "State" offenses therefore confirms rather than undermines the conclusion that Section 922(g)(1) starts with an even larger universe of convictions. See *Gonzales*, 520 U.S. at 5 ("Given that Congress expressly limited the phrase 'any crime' to only federal crimes, we find it significant that no similar restriction modifies the phrase 'any other term of imprisonment.'") (construing 18 U.S.C. 924(c)(1)).

Second, and in any event, in light of the gun control law's broadly protective purpose, Congress could reasonably choose to proceed circumspectly in the creation of exceptions. By excluding only state and federal crimes, Congress carved out from Section 922(g)'s prohibition only business crimes involving forms of regulation with which Congress was quite familiar. Due to the variety and disparity in how other nations define, label, and classify their penal provisions, however, Congress could be less confident that analogous conduct in foreign jurisdictions would lead to felony convictions in the first place, or that granting the ex-

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18 U.S.C. 924(a)(4) (deeming a violation of 18 U.S.C. 922(q) to be a misdemeanor despite the five-year sentence imposed).

clusion would exempt only relatively non-dangerous individuals.[16]

Third, the crux of petitioner's argument is not that the text of Section 922(g)(1) excludes foreign convictions—its plain meaning encompasses them—but that it would be "peculiar" if "[a]n individual convicted of an offense in Canada classified as a misdemeanor which carries a maximum sentence of two years imprisonment could not possess a firearm, but an individual convicted of an offense in a State court * * * which carries a maximum sentence of two years imprisonment could possess a firearm." Pet. Br. 17. Perhaps that would be an unusual outcome. But subjective assessments of whether particular applications of a law are "peculiar" provide no basis for courts to

[16] Furthermore, at the same time that Congress first enacted and then reenacted in 1986 Section 922(g)(1)'s "any court" provision, the law provided a mechanism for individuals to obtain relief from firearms disabilities like Section 922(g)(1). Section 925(c) permits individuals to apply to the Attorney General for relief, *inter alia*, from the prohibition on possessing firearms. The enacting Congress thus knew that the statute contained a safety valve for individuals whose foreign convictions did not warrant a ban on possessing firearms. The Attorney General has delegated the authority to grant relief from the firearms disability to ATF. Since 1992, Congress has included language in ATF's annual appropriation that forbids it from expending any funds to act upon applications by individuals for relief under Section 925(c). See generally *United States* v. *Bean*, 537 U.S. 71, 73-75 (2002). That action by subsequent Congresses, however, casts no relevant light on the intent of the 1968 and 1986 Congresses that enacted and reenacted the "any court" language. See, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) ("We have often observed, however, that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (quoting *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)).

disregard duly enacted statutory text. The Constitution leaves such value judgments to the political branches.

Beyond that, to the extent that petitioner can espy in the statutory text the potential for an occasional anomaly, Congress evidently was untroubled by that prospect in framing the firearm prohibitions. To illustrate, under Section 921(a)(20)(B), federal convictions for offenses punishable by up to two years in prison serve as disabling predicates, while their state-law counterparts do not—*if* they are classified under state law as "misdemeanors." See, *e.g.*, 21 U.S.C. 841(b)(3) (drug possession); 21 U.S.C. 844(a) (same); 18 U.S.C. 3146(b)(A)(iii) (failure to appear); 18 U.S.C. 228 (failure to pay child support); 15 U.S.C. 645 (theft or embezzlement of certain funds); 26 U.S.C. 5691(a) (non-payment of tax).[17] More generally, differences in state laws mean that conduct that would give rise to the firearms disability if committed in one State (because that State treats the conduct as a felony) would not lead to a disability if committed in a State that denominates the equivalent crime a misdemeanor. Petitioner presumably would not argue that courts must rewrite the statute to prevent those disparate results from arising. But, if courts lack the authority to emend statutory language to eliminate such anomalies under domestic law, courts have no greater license to read "any" to mean something less than "any" just to avoid the differential treatment of domestic and foreign convic-

[17] Congress was fully aware that there were federal offenses that were punishable by up to two years of imprisonment at the time it enacted 18 U.S.C. 921(a)(20)(B), because that is the exact penalty it imposed for violations of 18 U.S.C. App. 1202(a) (1970); see also 18 U.S.C. 930(e)(1).

tions that petitioner hypothesizes. Cf. *Caron*, 524 U.S. at 314-316 (construing the gun control law's exception for persons whose state-law right to possess firearms has been restored, 18 U.S.C. 921(a)(20), to permit a Section 922(g)(1) prosecution for the possession of firearms that state law expressly permits the defendant to possess, despite the potential for "incongruities").

More importantly, petitioner's proposed reading of "any court" as excluding foreign courts would create a greater and more dangerous interpretive anomaly. If foreign convictions are entirely excluded, then those convicted of murder, rape, armed robbery, and terrorism overseas could freely possess, receive, ship, and transport firearms within the United States, while a person convicted domestically of tampering with a vehicle identification number, 18 U.S.C. 511(a), or possessing a "three-neck round-bottom flask," 21 U.S.C. 843(a)(6), could be barred for life from possessing firearms. It is hard to see the sense in that. Furthermore, petitioner's cramped reading of statutory text presupposes that, while Congress wanted to prevent importers, dealers, and manufacturers from trafficking firearms to terrorists, 18 U.S.C. 921(a)(22), Congress cared not at all whether those persons actually convicted of assassination, kidnapping, or other "violent acts or acts dangerous to human life" abroad, 18 U.S.C. 921(a)(22) (B) and (C)(iii), are able to ship, transport, receive, and possess firearms in the United States. There is "no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." *United States* v. *Winson*, 793 F.2d 754, 758 (6th Cir. 1986) (citations omitted).[18] Thus, if statutory construction is to be driven by the desire to avoid "peculiar" results, that mode of analysis dictates that Section 922(g)(1)'s reference to convictions in "any court" be read to include foreign courts.

For many of those same reasons, petitioner's reliance (Br. 24-25) on the express reference in 18 U.S.C. 921(a)(33)(A)(i) to domestic violence misdemeanors under "Federal or State law" is misplaced. Petitioner's reading of the statute would leave the phrase "Federal or State law" no work to do. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001). And petitioner's reading creates worse anomalies in coverage than those he hypothesizes (Br. 24-25). Under his approach, a person convicted of violating a restraining order by telephoning his estranged wife is barred for life from possessing firearms, but if that same person shoots and kills his estranged wife during a Canadian vacation, he can buy as many guns as he wants. See *Caron*, 524 U.S. at 316 (rejecting reading of gun control law that "would undermine [Congress's] protective purpose").[19]

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[18] See also *United States* v. *Gayle*, 342 F.3d 89, 93 (2003), ("[T]here are legitimate reasons why, depending upon the crime, Congress might have wished to include foreign convictions. For example, Congress might well have intended that a violent crime * * * such as murder qualify as a predicate offense under § 922(g)(1)."), as amended on reh'g (2d Cir. 2004), cert. denied, No. 03-10327, 124 S. Ct. 2888 (2004), and petition for cert. pending, No. 03-1510 (filed May 6, 2004); cf. *Kole*, 164 F.3d at 175 (Because the statutory text "reflects a congressional intent to significantly increase sentences for drug offenders with prior convictions for felony drug offenses[,] * * * it would not be logical to limit the enhancement to those persons who had been convicted of a prior drug felony (or its equivalent) only in the United States.").

[19] See Office of Justice Programs, Dep't of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress Under*

In short, legislation requires linedrawing, and the gun control law is no exception. Petitioner no doubt would prefer that those lines had fallen elsewhere. But the "fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) (quoting *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)). The Court's task is to "interpret, rather than author," federal laws. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 n.7 (2001). Here, Congress chose comprehensive language to serve a broad and comprehensively protective purpose. The Court is "not at liberty to rewrite" that language, *id.* at 495 n.7, or to afford it anything other than its full and natural meaning.

E. The Legislative History Of Section 922(g)(1) Supports Its Straightforward Application To Convictions In Foreign Courts

1. Because the natural meaning of Section 922(g)(1)'s language "any court" includes foreign courts and because that understanding is confirmed by the statute's structure, purpose, the administering agency's reasonable interpretation of the statutory language, and Congress's specialized usage of the phrase "convicted in any court," there is no need to resort to legislative history. *Ratzlaf*, 510 U.S. at 147-148 ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). In any event, there is no

the Violence Against Women Act 24-26 & App. B (July 1998) (listing States that treat the violation of a protective order as the felony).

legislative history that specifically discusses whether "any court" includes or excludes foreign courts.[20]

To the extent that the legislative history is relevant, the evolution of Section 922(g)(1) supports the conclusion that "any court" includes foreign courts. On two occasions before the present version of Section 922(g)(1) was enacted, Congress passed laws disqualifying felons from possessing or trafficking in firearms based only on convictions from state and federal courts. See Federal Firearms Act, ch. 850, § 2, 52 Stat. 1250 (codified at 15 U.S.C. 902(d) (1940), and 15 U.S.C. 902(d) (1964)); 18 U.S.C. App. 1202(a)(1) (1970). Congress specifically deleted those limitations through later amendments, as part of a concerted legislative effort to "enlarge[] the group of people coming within the Act's substantive prohibitions," *Bass*, 404 U.S. at 343 n.10. See 1968 Omnibus Act, Pub. L. No. 90-351, § 922(e), 82 Stat. 230-231 (1968); 1986 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6)(D), 100 Stat. 452. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2479 (2004) (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)). There thus is no basis for construing the present version of Section 922(g) to incorporate a limitation that Congress twice deleted from the law. See *Keene Corp.* v. *United States*, 508 U.S.

[20] See *Atkins*, 872 F.2d at 96 (1989) (noting that "the scant legislative history of 18 U.S.C. § 922 * * * offer[s] no illumination as to Congress's intended meaning"); *Winson*, 793 F.2d at 756 ("[A]n examination of the legislative history of Title IV reveals no discussion of the actual meaning of the phrase "in any court."); cf. *United States* v. *Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000) ("The legislative history does not illuminate the meaning of 'convictions by any court'" in 18 U.S.C. 924(e)).

200, 208 (1993) (it is the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out").

Nor can it fairly be argued that Congress dispensed with the qualifying "State or Federal" court language on the ground that such terms of limitation were unnecessary because "any court" would naturally be understood to refer only to domestic courts. If that were the case, there was no reason for Congress to enact, in conjunction with its 1968 and 1986 adoption of the "any court" phraseology, the "State and Federal" law limitations on the statutes' coverage of business, misdemeanor, and domestic violence crimes, 18 U.S.C. 921(a)(20), 922(g)(9).

In short, petitioner's reading of the legislative history would require the Court to hold that the 1968 and 1986 amendments deleting "State" and "Federal" were meaningless *and* that the qualifying "State" and "Federal" language simultaneously included elsewhere was surplusage. By contrast, affording "any court" its natural compass, as including foreign courts, would give practical effect to the 1968 and 1986 amendments, would be consistent with Congress's legislative purpose, and would give meaning to all of the words Congress enacted.

2. Petitioner (Br. 31-37), like the Second Circuit in *United States* v. *Gayle*, 342 F.3d 89, 94-95 (2003), as amended on rehearing (2d Cir. 2004), cert. denied, No. 03-10327, 124 S. Ct. 2888 (2004), and petition for cert. pending, No. 03-1510 (filed May 6, 2004), places great weight on the Senate Judiciary Committee's Report on the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1220. See S. Rep. No. 1501, 90th Cong., 2d Sess. (1968). That Report accompanied a bill that defined the "felony" convictions that would debar an individual

from possessing firearms as, "in the case of a Federal law, an offense punishable by imprisonment for a term exceeding one year, and in the case of a State law, an offense determined by the laws of the State to be a felony." S. 3633, 90th Cong., 2d Sess. 11 (1968); see also S. Rep. No. 1501, *supra*, at 31. As the Second Circuit (*Gayle*, 342 F.3d at 95-96) and petitioner (Br. 33-35) further note, the House bill referred broadly to "any court." See H.R. 17735, 90th Cong., 2d Sess. 17-18 (1968). The two competing bills went to a Conference Committee, where the language of the Senate bill was rejected in favor of the broader "any court" language of the House bill. See H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 28-29 (1968). The Second Circuit reasoned (342 F.3d at 95), in an argument that petitioner echoes (Br. 35), that the Conference Report's failure to voice express disagreement with the Senate Report's definition of "felony" compels the conclusion that "any court" refers only to domestic courts.

In so holding, the Second Circuit noted that those "illuminating reports * * * have never been cited in a judicial opinion on the question and were not cited in the briefs furnished to us." *Gayle*, 342 F.3d at 95 n.6. There is a good reason for that. Those reports *postdate* by three and four months respectively Congress's enactment of the "any court" language in Section 922(e) of the 1968 Omnibus Act. All that the 1968 Gun Control Act did with respect to that Section was move it to its current location at 18 U.S.C. 922(g)(1), and add unrelated additions to the list of prohibited persons. Pub. L. No. 90-618, § 922(g), 82 Stat. 1220.

Petitioner's argument suffers from a second critical flaw. The Senate bill and the qualifying language to which the Report refers *were not enacted*. Instead, the Conference Report expressly rejected the Senate's

language and adopted the House bill's definition of "felony," which lacked language limiting the qualifying felonies to those entered by state or federal courts. H.R. Conf. Rep. No. 1956, *supra*, at 28-29. Far from being "illuminating" (342 F.3d at 95 n.6), such "failed legislative proposals," and *a fortiori* the Committee Reports elaborating on those failed proposals, "are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (citation omitted).[21] Contrary to petitioner's argument (Br. 34), that rejection was one of substance not "terminology." The Senate version of the law that went to the Conference Committee had not only restricted the courts that could enter triggering felonies, but also had limited the bar to "crime[s] of violence." H.R. Conf. Rep. No. 1956, *supra*, at 28-29. The law as enacted thus rejected the Senate's proposed restrictions on qualifying convictions and, for the *third* time, specifically omitted language that would have limited qualifying convictions to domestic courts.

3. Petitioner's reliance (Br. 37-41) on the legislative history of the 1986 Firearms Owners' Protection Act fares no better. Petitioner relies on the fact that Congress consolidated two largely overlapping prohibitions that had previously been enacted in Titles IV and VII of the 1968 Omnibus Act. See *Barrett*, 423 U.S. at 220; see generally *Bass*, 404 U.S. at 342-343 & nn.9-10 (describing legislation). Petitioner insists (Br. 37) that Congress intended only to "merge[]" Title VII's provisions into Title IV, and contends that Congress's deletion of the limiting phrase court of the "United States or of a State or any political subdivision thereof" in the Title VII provision, 18 U.S.C. App. 1202(a) (1970), was of no consequence because "[n]o one suggested that any inconsistencies existed" (Br. 39). But on the face of the laws, textual inconsistencies did exist between Title IV's unqualified reference to "any court" and Title VII's more limited reference. The absence of legislative history discussing the difference is beside the point.[22]

Petitioner further emphasizes (Br. 38-39) that, in discussing the choice-of-law provision (now codified at 18 U.S.C. 921(a)(20)), Congress discussed developments in state law. See S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984). That is true. It is also beside the point. The Report nowhere says or suggests that foreign convictions are excluded or that "any" means something less than "any." Perhaps some Members of Congress "had in mind" (Pet. Br. 39) federal and state law crimes. But Congress often legislates in broader terms than the precise problem that motivated some of the legislators, and the limited concerns of some legislators cannot justify disregarding duly enacted statutory text. The more reliable indicator of congressional intent is what Congress said—"any court"—and what Congress did—delete language that would have limited Section

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[21] See also *United States* v. *Price*, 361 U.S. 304, 310-311 (1960) ("Such non-action by Congress affords the most dubious foundation for drawing positive inferences."); see generally Recent Cases, *Criminal Law—Predicate Offenses Barring Possession of a Firearm*, 117 Harv. L. Rev. 1267 (Feb. 2004).

[22] Moreover, petitioner relies (Br. 37-39) principally on Senate Report No. 583, 98th Cong., 2d Sess. (1984). But once again, petitioner relies on legislative history that pertains to an unenacted bill. Senate Report No. 583 accompanied S. 914, 98th Cong., 2d Sess. (1984). That bill was succeeded by S. 49, 99th Cong., 1st Sess. (1985), which was the ultimate basis for the 1986 Act.

922(g)(1)'s bar to convictions entered by courts of "the United States or of a State."[23]

Petitioner's invocation (Br. 41-42) of the Brady Handgun Violence Prevention Act of 1993 (Brady Act), Pub. L. No. 103-159, Title I, 107 Stat. 1536, is equally unhelpful. The Brady Act postdates by a quarter century Congress's enactment of the "any court" language in Section 922(g)(1). See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) ("[L]ater enacted laws * * * do not declare the meaning of earlier law."). In any event, Congress's directive that the Attorney General establish on an expeditious basis a computerized National Instant Criminal Background Check System (NICS) incorporating state criminal conviction records does not mean that foreign convictions are excluded. It just means that Congress set priorities, in light of limited resources and the state of computer technology worldwide in the early 1990s. Moreover, as discussed at page 15, *supra*, NICS does include some foreign convictions and cross-references the records of Immigration and Customs Enforcement.[24]

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[23] See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Beecham*, 511 U.S. at 374 ("[O]ur task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular cases. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning.").

[24] The fact that the Attorney General is not required to notify foreign governments of any mistakes in their records (see Pet. Br. 43) simply reflects Congress's preeminent concern with improving domestic recordkeeping, as well as Congress's traditional hesitation to prescribe Executive Branch communications with foreign governments. Petitioner's focus (*ibid.*) on the absence of a private cause of action against foreign governments to require them to correct their criminal records overlooks the serious enforceability, sovereign immunity, international comity, and foreign relations implications of authorizing such suits.

F. Concerns About Possible Unfairness In The Criminal Procedures Of Foreign Courts Do Not Mandate The Wholesale Exclusion Of Foreign Convictions From Section 922(g)(1)

Petitioner's objection to the inclusion of foreign convictions rests heavily on the potential for unfairness he perceives in foreign criminal proceedings. Pet. Br. 10-11, 16. But, despite his complaints (Br. 10-11), petitioner does not claim that there was any fundamental unfairness in the proceedings by which he was convicted in Japan. Pet. i, 3 n.1; Pet. Br. 4 n.3. Nor has any such unfairness been identified in the foreign convictions in any of the prosecutions that have been brought under Section 922(g)(1). See *Atkins*, 872 F.2d at 95 n.1; *Winson*, 793 F.2d at 757; see also *Gayle*, 342 F.3d at 91-96 (no suggestion of impropriety for Canadian conviction); *United States* v. *Concha*, 233 F.3d 1249, 1253-1257 (10th Cir. 2000) (no suggestion of impropriety for British conviction). The "mere possibility of making th[e] argument" that a particular application of a law could be unfair did not lead this Court to deny the phrase "convicted in any court" its full and natural meaning in *Lewis*, 445 U.S. at 61 n.5, and it should not do so here. There is no basis for broadly foreclosing the use of any foreign conviction under Section 922(g)(1), no matter how serious the crime and no matter how fairly obtained, just to dispel

the possibility that someone else's foreign conviction might be entered unfairly.

1. ***Section 922(g)(1) focuses on the fact of conviction***

In *Lewis*, this Court rejected the argument that potentially unconstitutional state court convictions should not trigger a firearms disability under the former 18 U.S.C. App. 1202(a)(1) (1976) or Section 922(g)(1). See 445 U.S. at 60-67; *id.* at 58 n.4 (noting that the "identical issue" arises under Section 922(g)(1)). The Court first held that the plain language of Section 1202(a)(1) (like Section 922(g)(1)) contains no textual basis for restricting its coverage to lawful convictions or those immune from collateral attack. *Id.* at 60. The Court then held that it is "the *fact* of a felony conviction" alone that triggers the firearm disability. *Ibid.* The fact of a conviction is sufficient, without more, to implicate Congress's concern that firearms be kept away from "potentially irresponsible and dangerous" persons. *Id.* at 65 (quoting *Barrett*, 423 U.S. at 218); see also *Custis*, 511 U.S. at 490-491 ("The statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted.").

That same rationale applies to foreign convictions. Indeed, if an *actually* unconstitutional and fundamentally unfair state conviction still validly disqualifies an individual from possessing firearms under Section 922(g)(1), then there is no sound reason why petitioner's fundamentally fair conviction from a foreign jurisdiction should automatically be excluded. The law's "focus [is] not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Lewis*, 445 U.S. at 67.

Furthermore, the prohibition on possessing firearms is an "essentially civil disability." *Lewis*, 445 U.S. at 67. "The statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." *Custis*, 511 U.S. at 490-491. Thus, even if the Constitution requires some review of the fairness by which a foreign conviction is obtained when it is used to "support guilt or enhance punishment," *Lewis*, 445 U.S. at 67 (citation omitted), *Lewis* makes clear that there is no such prerequisite to the enforcement of an essentially civil disability through a criminal sanction, *ibid.*

The fact that indictment alone is sufficient to trigger what is in effect a statutory prohibition on purchasing or receiving firearms (see 18 U.S.C. 922(d)(1), 922(n)) underscores the essentially civil character of the disability imposed, as does Section 922's bar on possession by persons dishonorably discharged by the military, 18 U.S.C. 922(g)(6); see 32 C.F.R. Pt. 70 (discharge procedures). Those provisions confirm that Congress did not intend compliance with the full panoply of criminal defendant's rights under the federal Constitution to be a prerequisite for Section 922's proscriptions to attach. Rather, Congress was looking for a "convenient," albeit "somewhat inexact, way of identifying 'especially risky people,'" *Dickerson*, 460 U.S. at 120. Thus, a foreign conviction is used in Section 922(g)(1), not as an authoritative adjudication of criminal liability for purposes of imposing criminal sanctions for the foreign offense of conviction, but rather as a roughly reliable indicator of the individual's status as a potentially dangerous person. Cf. *Hilton* v. *Guyot*, 159 U.S. 113, 145 (1895) ("A judgment affecting the status of persons * * * is recognized as valid in every country, unless

contrary to the policy of its own law."). Congress's judgment that the fact of a conviction—whether federal, state, or foreign—adequately serves that purpose is rational and should be respected, especially "when one considers Congress' broad purpose." *Lewis*, 445 U.S. at 67.

2. *Congress was aware that foreign convictions often have domestic consequences*

Petitioner expresses concern (Br. 4-8 & n.3, 16) that recognizing foreign convictions as qualifying felonies for Section 922(g)(1) would result in the consideration of convictions obtained without the protections afforded criminal defendants in American courts (Pet. Br. 30-31), and he thus concludes that Congress would not have intended their inclusion. But attaching essentially civil consequences to the *fact* of a foreign conviction is not as uncommon as petitioner supposes. In fact, it occurs in a variety of areas, and Congress must be presumed to have enacted Section 922(g)(1)'s "any court" language with those background practices in mind.

a. A prime example is extradition proceedings. Extradition is a quasi-civil process by which fugitive individuals, including American citizens, are removed to foreign countries to face criminal charges or to serve a sentence following a conviction there. See 18 U.S.C. 3184, 3196; *United States* v. *Fernandez-Morris*, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). Upon application by the federal government, the district court issues an arrest warrant and certifies extraditability upon finding only that (1) the crime is extraditable (*i.e.*, it is covered by the terms of an existing extradition treaty and is a crime in both countries), and (2) there is probable cause to believe the fugitive committed the charged crime. See generally *Fernandez* v. *Phillips*, 268 U.S.

311, 312-314 (1925); *Ornelas* v. *Ruiz*, 161 U.S. 502, 512 (1896). Direct appeal of the certification is not available, but the person can obtain collateral review through habeas corpus. See *Kastnerova* v. *United States*, 365 F.3d 980, 984 & n.4 (11th Cir.), cert. denied, 124 S. Ct. 2826 (2004). Habeas corpus review is narrow and limited to whether the extraditing court had jurisdiction, whether there was jurisdiction over the fugitive individual, whether the extradition treaty was in force and covered the crime at issue, and whether any evidence supports the extraditing court's finding of probable cause. *Id.* at 984. Once those basic findings are made, the decision whether to extradite the person is committed to the discretion of the Secretary of State. See 18 U.S.C. 3186.

It is the fact of a foreign conviction or charge covered by an extradition treaty, combined with probable cause, that empowers the United States government to seize a person (including a citizen) and hand the individual over to another country's criminal justice system. The judiciary undertakes no inquiry into the perceived fairness or reliability of the foreign courts' proceedings. The foreign court is not required to conduct its criminal trials according to the requirements of the United States Constitution. "[T]hose provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Neely* v. *Henkel*, 180 U.S. 109, 122 (1901). Furthermore, whatever his complaints about the Japanese criminal justice system (Pet. Br. 4-8), petitioner's

> citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed

to its own people by the country whose laws he has violated.

Neely, 180 U.S. at 123. Petitioner thus "cannot complain" that he was "required to submit to such modes of trial and to such punishment as the laws of [Japan] may prescribe for its own people." *Ibid.*; see also *Wilson* v. *Girard*, 354 U.S. 524 (1957) (upholding extradition of American citizen to Japan). For extradition, it is enough that the Legislative and Executive Branches together, as manifested in the particular treaty or convention, have jointly determined that the foreign country's procedures are "adequate to the ends of justice." *Neely*, 180 U.S. at 123. Beyond that, "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Ahmad* v. *Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) (quoting *Jhirad* v. *Ferrandina*, 536 F.2d 478, 484-485 (2d Cir.), cert. denied, 429 U.S. 833 (1976)).[25]

The United States has extradition treaties with Japan and more than 100 other foreign governments permitting the extradition of United States citizens to stand trial or serve sentences in those countries. See Treaty on Extradition Between the United States of America and Japan, 31 U.S.T. 892 (Mar. 3, 1978); 18

[25] See also *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 ("[C]ourts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."), amended by 73 F.3d 887 (9th Cir. 1995), cert. denied, 518 U.S. 1022 (1996); *United States* v. *Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964) ("[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

U.S.C. 3181 (Historical and Statutory Notes) (listing 119 extradition treaties). That documents the joint conclusion of Congress and the Executive Branch that the criminal justice systems of many nations sufficiently comport with the rudiments of fair process as to warrant seizing American citizens and handing them over for trial and punishment in those countries. And, since Congress concluded that those countries' judicial systems warranted respect in an extradition treaty, there is no reason why Congress would have hesitated to make convictions entered in those same systems the basis for a domestic firearms disability.[26]

b. Foreign criminal convictions and criminal activities are also accorded recognition in federal immigration law. 8 U.S.C. 1101(a)(43) (defining an aggravated felony, which disqualifies aliens from a variety of forms of immigration relief and benefits, to include "an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years"); 8 U.S.C. 1182(a)(2)(A)(i) (convictions of controlled substance offense or crimes of moral turpitude in foreign country render alien admissible).[27]

In addition, the Antiterrorism Act of 1990 provides that a foreign criminal conviction generally will "estop the defendant from denyng the essential allegations of the criminal offense in any subsequent civil proceeding"

[26] Because Japan is among those countries with which the United States has an extradiction treaty, this case does not present the question whether the predicate foreign convictions under Section 922(g)(1) include those countries with which the United States does not have such a treaty.

[27] See also *Ortiz* v. *INS*, 179 F.3d 1148, 1154-1155 (9th Cir. 1999); *Chiaramonte* v. *INS*, 626 F.2d 1093, 1098 & n.4 (2d Cir. 1980); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

for damages arising from a terrorist act. 18 U.S.C. 2223(c).

c. Foreign convictions for sexual offenses are also taken into account in administering some sex offender registries and notification systems. For example, if the federal Bureau of Prisons receives, under the International Treaty Transfer Program, 18 U.S.C. 4100, 4102, a United States citizen who was convicted of a sexual crime in a foreign country, that foreign conviction subjects him to the rules requiring community notification, including sex-offender registration, before release. See 28 C.F.R. 571.72; Bureau of Prisons, Dep't of Justice, *Program Statement No. 5141.02* (Dec. 14, 1998). At least two States also include convictions for foreign sex offenses in their sex offender registration programs. See Kan. Stat. Ann. § 21-4704(j) (Supp. 2002), as amended by 2004 Kan. Sess. Laws 175 (May 20, 2004); Ohio Rev. Code Ann. §§ 2950.01(D)(1)(f), 2950.09(A) (Anderson 2003). [28]

d. The federal Sentencing Guidelines also permit consideration of foreign convictions. While sentences resulting from foreign convictions are not counted in determining a defendant's criminal history category, they may be considered by the court in assessing the adequacy of the criminal history category to determine

[28] A number of States also count foreign convictions in their provisions governing habitual offenders. See Cal. Penal Code § 668 (West 2004); Kan. Stat. Ann. § 21-4504(b) (1995 & Supp. 2004); La. Rev. Stat. Ann. § 15.529.1 (West 2004); Okla. Stat. Ann., title 21, § 54 (West 2002); 42 Pa. Cons. Stat. Ann. § 9721, ch. 303.8(f) (West 2004); Tenn. Code Ann. §§ 40-35-106(b)(5), 40-35-107(b)(5), 40-35-108(b)(5) (2003); Vt. Stat. Ann. title 13, § 11 (1998); see generally Alex Glashausser, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 Duke L. J. 134 (Oct. 1994)

whether an upward departure is warranted. See Sentencing Guidelines §§ 4A1.2(h), 4A1.3(a); see also *United States* v. *Simmons*, 343 F.3d 72, 78-79 (2d Cir. 2003) (upward departure based on Canadian convictions); *United States* v. *Fordham*, 187 F.3d 344, 347-348 (3d Cir. 1999), cert. denied, 528 U.S. 1175 (2000).[29]

In short, including convictions entered by foreign courts in Section 922(g)(1), would not be the anomaly that petitioner postulates. In light of the large number of individuals moving transnationally and the undeniable reality of trans-border crime, a variety of statutory schemes take cognizance of foreign convictions. To do otherwise would create serious disparities in the face of the increasing prevalence of individual criminals and crimes that are not strictly contained within national boundaries. Indeed, no country has proven more receptive to the recognition of foreign judgments than the United States. Restatement, *supra*, at 592 (introductory note).[30] What petitioner has not attempted to explain is how Congress could consider large numbers of foreign courts systems sufficiently fair and reliable to deprive an American citizen of liberty, to incarcerate

[29] *Simmons* suggested that foreign convictions occurring in less-familiar legal systems might require "further inquiry and development before they may properly support an upward departure," 343 F.3d at 79, but the court had no occasion to decide that point.

[30] See also *Ritchie* v. *McMullen*, 159 U.S. 235, 241-242 (1895); *Hilton*, 159 U.S. at 182-206; 18 U.S.C. 3505 (allowing admission into evidence of foreign records of regularly conducted activity). Petitioner cites (Br. 29-30) *People* v. *Braithwaite*, 240 N.W.2d 293 (Mich. Ct. App. 1976), for the proposition that courts refuse to recognize foreign judgments, but that dicta has been repeatedly repudiated. See, *e.g.*, *People* v. *Galvan*, 572 N.W.2d 49, 50 n.1 (Mich. Ct. App. 1997), appeal denied, 586 N.W.2d 403 (Mich. 1998); *People* v. *Gaines*, 341 N.W.2d 519, 521 (Mich. Ct. App. 1983).

American citizens abroad, to trigger civil sex offender notification laws, and to withhold relief under the immigration laws, but not reliable enough to trigger an essentially civil firearms disability or to bar the possession of biological weapons and explosive materials.[31]

3. *No extensive review for fundamental fairness is required*

The court of appeals considered it obvious that foreign convictions were covered by Section 922(g)(1)'s reference to "any court." The court went on to hold, however, that foreign convictions could provide the predicate for a Section 922(g)(1) prosecution only if they satisfied the multi-prong test of the Restatement, *supra*, § 482, at 604. But, as this Court recognized in *Lewis*, *supra*, Congress focused on the fact of conviction and did not want to transform the firearms provisions into a vehicle for collateral attacks on convictions entered by other jurisdictions. *Lewis* thus made clear that the fact of a conviction alone triggers Section 922(g)(1)'s coverage, even if the conviction could be collaterally attacked as unconstitutional. 445 U.S. at 67. A departure from constitutionally prescribed procedures is no more significant (and is arguably less so)

[31] The presumption against the extraterritorial application of federal law, see *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), has no application here. Section 922(g)(1) regulates the possession, receipt, shipment, and transportation of firearms by individuals within the territory of the United States. It does not regulate conduct on foreign territory. The mere fact that domestic consequences attach to foreign conduct does not make the law any more extraterritorial than a domestic prohibition on donating blood based on foreign travel or a law assessing Customs duties based on purchases abroad.

when it occurs in a foreign country than when it occurs at home.[32]

Finally, if the Court concludes that some form of collateral review of the foreign conviction is necessary before it can trigger Section 922(g)(1)'s bar, that review should be appropriately deferential and should require nothing more than the most fundamental rudiments of fair process. Principles of international comity preclude (absent congressional direction to the contrary) retrying the merits of foreign judgments or insisting that other nations follow every dictate of the United States Constitution. That is especially true in cases like this, where the Executive Branch has already exercised its discretion to premise a prosecution on the foreign conviction. In *Hilton*, this Court held that the central prerequisites for *enforcement* of a foreign judgment are (1) jurisdiction in the trial court, (2) regularized proceedings, (3) notice to the defendant, and (4) "a system of jurisprudence likely to secure an impartial administration of justice." 159 U.S. at 202; see also *Neely*, 180 U.S. at 123 (holding that, in extradition cases, the foreign court system need only be "adequate to the ends of justice" and not discriminate against

[32] In *Lewis*, 445 U.S. at 67, the Court noted that criminal defendants generally have other avenues for challenging their predicate convictions, such as through an appeal. Likewise, those convicted abroad often may appeal their convictions within the foreign court system. See, *e.g.*, Japanese Ministry of Justice, *Criminal Justice in Japan* 20-21. For example, petitioner would have been provided counsel to appeal his case, *id.* at 10, 20-21, but he "failed to pursue [that] remed[y]," so he now "is without recourse," *Daniels* v *United States*, 532 U.S. 374, 382 (2001). In any event, even in the United States, the opportunity to appeal a criminal conviction is not constitutionally mandated. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110 (1996).

American citizens). No more should be required for the mere recognition of a foreign judgment under Section 922(g)(1).[33]

With respect to petitioner's case, the very type of evidentiary and cross-examination objections to the Japanese proceedings that he levels (Br. 4-8) were found inadequate to impeach a foreign judgment in *Hilton*. See 159 U.S. at 205 (Because "the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment."); compare Pet. Br. 4 (objecting to lack of a jury trial), with *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2525 (2004) ("the mixed reception that the right to jury trial has been given in other countries * * * surely makes it implausible that judicial factfinding so seriously diminishes accuracy as to produce an impermissibly large risk of injustice") (internal quotation marks, brackets, and emphasis omitted).

4. *The rule of lenity does not apply*

Petitioner errs (Br. 47-48) in invoking the rule of lenity in the construction of criminal statutes. That rule

[33] Cf. *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 841 (1987) (due process requires some opportunity for "impartial judicial" review before a civil administrative deportation order will support a criminal prosecution for unlawful reentry); *id.* at 839 n.17; *Kole*, 164 F.3d at 171 (holding that, with respect to Philippines' criminal judgment used to enhance a defendant's sentence under 21 U.S.C. 851(a), "Congress intended only to ensure fundamental fairness by excluding any conviction that was obtained in a manner inconsistent with concepts of fundamental fairness and liberty endemic in the Due Process Clause of the Fifth Amendment of the United States Constitution.").

applies only when the statutory language is ambiguous, *Lewis*, 445 U.S. at 65, and, even then, only when "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (internal quotation marks omitted and punctuation altered). The phrase "any court" is undeniably broad. But the fact that statutory language is sweeping does not render it ambiguous. Nor does the fact that Congress may not have specifically considered the application of Section 922(g) to foreign convictions. That a law can apply to situations not anticipated by its drafters "does not demonstrate ambiguity. It demonstrates breadth." *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 262 (1994) (quotation marks and citations omitted). The natural expanse of "any court" is clear, both on its face and when considered in light of the overall structure, purpose, and history of Section 922(g)(1). See *Lewis*, 445 U.S. at 60 ("The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability."). That is sufficient to foreclose resort to the rule of lenity. *Bowman*, 260 U.S. at 102. Indeed, it is particularly hard for petitioner to contend that, when he purchased a firearm *one week* after completing his Japanese sentence, he was not on fair notice that he had been "convicted in *any* court."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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18 U.S.C. § 921. Definitions

(a) As used in this chapter—

(1) The term "person" and the term "whoever" include any individual, corporation, company, association, firm, partnership, society, or joint stock company.

(2) The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and

made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches.

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term "short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.

(9) The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term "licensed importer" means any such person licensed under the provisions of this chapter.

(10) The term "manufacturer" means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this chapter.

(11) The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

(12) The term "pawnbroker" means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money.

(13) The term "collector" means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define, and the term "licensed collector" means any such person licensed under the provisions of this chapter.

(14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

(15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

(16) The term "antique firearm" means—

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica—

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

(17)(A) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

(B) The term "armor piercing ammunition" means—

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term "armor piercing ammunition" does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

(18) The term "Attorney General" means the Attorney General of the United States;

(19) The term "published ordinance" means a published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Attorney General, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(21) The term "engaged in the business" means—

(A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(B) as applied to a manufacturer of ammunition, a person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition manufactured;

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby,

or who sells all or part of his personal collection of firearms;

(D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(E) as applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and

(F) as applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.

(22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this paragraph, the term "terrorism" means

activity, directed against United States persons, which—

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

(24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

(25) The term "school zone" means—

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.

(27) The term "motor vehicle" has the meaning given such term in section 13102 of title 49, United States Code.

(28) The term "semiautomatic rifle" means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.

(29) The term "handgun" means—

(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.

(30) The term "semiautomatic assault weapon" means—

(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—

(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);

(ii) Action Arms Israeli Military Industries UZI and Galil;

(iii) Beretta Ar70 (SC-70);

(iv) Colt AR-15;

(v) Fabrique National FN/FAL, FN/LAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M-12;

(vii) Steyr AUG;

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a bayonet mount;

(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and

(v) a grenade launcher;

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—

(i) an ammunition magazine that attaches to the pistol outside of the pistol grip;

(ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;

(iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and

(v) a semiautomatic version of an automatic firearm; and

(D) a semiautomatic shotgun that has at least 2 of—

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a fixed magazine capacity in excess of 5 rounds; and

(iv) an ability to accept a detachable magazine.

(31) The term "large capacity ammunition feeding device"—

(A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition; but

(B) does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

(32) The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33)(A) Except as provided in subparagraph (C),[1] the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this

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[1] So in original. No subparagraph (C) was enacted in subsec. (a)(33).

chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(34) The term "secure gun storage or safety device" means—

(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;

(B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or

(C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

(35) The term "body armor" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.

(b) For the purposes of this chapter, a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located.

APPENDIX B

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State,

and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in

conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manu-

facturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to—

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of testing or experimentation authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to—

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Attorney General; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other

business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed

collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are ..... Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of

the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who[2] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

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[2] So in original. The word "who" probably should not appear.

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or

foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any

possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection—

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is—

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which—

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the

Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the[3] House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence,

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[3] So in original. Probably should be "of the".

and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm—

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State,

and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is—

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm—

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to—

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and

ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless—

(A) after the most recent proposal of such transfer by the transferee—

(i) the transferor has—

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer

that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that—

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed

dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only—

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee—

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who—

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to—

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (II) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law—

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the

sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless—

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall—

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if—

(A)(i) such other person has presented to the licensee a permit that—

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because—

(i) the ratio of the number of law enforcement officers of the State in which the

transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages—

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

(v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

(3) Paragraph (1) shall not apply to—

(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

(B) any firearm that—

(i) is manually operated by bolt, pump, lever, or slide action;

(ii) has been rendered permanently inoperable; or

(iii) is an antique firearm;

(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine.

The fact that a firearm is not listed in Appendix A shall not be construed to mean that paragraph (1) applies to such firearm. No firearm exempted by this subsection may be deleted from Appendix A so long as this subsection is in effect.

(4) Paragraph (1) shall not apply to—

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Attorney General.

(w)(1) Except as provided in paragraph (2), it shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device.

(2) Paragraph (1) shall not apply to the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of this subsection.

(3) This subsection shall not apply to—

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for

purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving ammunition, of a large capacity ammunition feeding device transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of any large capacity ammunition feeding device by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Attorney General.

(4) If a person charged with violating paragraph (1) asserts that paragraph (1) does not apply to such person because of paragraph (2) or (3), the Government shall have the burden of proof to show that such paragraph (1) applies to such person. The lack of a serial number as described in section 923(i) of this title shall be a presumption that the large capacity ammunition feeding device is not subject to the prohibition of possession in paragraph (1).

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to—

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile—

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except—

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition

with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas—

(1) Definitions.—In this subsection—

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.—Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is—

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is—

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver--

(A) Conditions for waiver.—Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if—

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.—Each petition under subparagraph (B) shall—

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the

date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (G)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.—The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner—

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

[Appendix to § 922 omitted.]

APPENDIX C

18 U.S.C. § 924 (2000), as amended by, Pub. L. No. 108-174, § 1(2), 117 Stat. 2481 (2003).

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the

provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that

if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or

dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in

order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or

the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)), travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(g) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of

State law unless such provision is inconsistent with any of the purposes of this subsection.

(i) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(j) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(k) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or

foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(n) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(*o*) Redesignated (n).

APPENDIX D

18 U.S.C. § 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(2) The provisions of this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Attorney General of the Army pursuant to section 4308 of title 10 before the repeal of such section by section 1624(a) of the Corporation for the Promotion of Rifle Practice and Firearms Safety Act, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Attorney General of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such

members, and such members or clubs may receive a firearm or ammunition determined by the Attorney General of the Treasury to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Attorney General to be consistent with the provisions of this chapter, except for provisions relating to firearms subject to the prohibitions of section 922(p), and other applicable Federal and State laws and published ordinances, the Attorney General may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A) determined by the Attorney General to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraph (3) of this subsection, the term "United States" means each of the several States and the District of Columbia.

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the

term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Attorney General shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition—

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1986 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1986 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms, except in any case where the Attorney General has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

The Attorney General shall permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

(e) Notwithstanding any other provision of this title, the Attorney General shall authorize the importation of, by any licensed importer, the following:

(1) All rifles and shotguns listed as curios or relics by the Attorney General pursuant to section 921(a)(13), and

(2) All handguns, listed as curios or relics by the Attorney General pursuant to section 921(a)(13), provided that such handguns are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

(f) The Attorney General shall not authorize, under subsection (d), the importation of any firearm the importation of which is prohibited by section 922(p).

APPENDIX E

18 U.S.C. § 926. Rules and regulations

(a) The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter, including—

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license;

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection; and

(3) regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in subsection (d)(8) or (g)(8) of section 922.

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Attorney General's authority to inquire into the

disposition of any firearm in the course of a criminal investigation.

(b) The Attorney General shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing such rules and regulations.

(c) The Attorney General shall not prescribe rules or regulations that require purchasers of black powder under the exemption provided in section 845(a)(5) of this title to complete affidavits or forms attesting to that exemption.

APPENDIX F

27 C.F.R. 478.11

Meaning of terms

* * * * *

Crime punishable by imprisonment for a term exceeding 1 year. Any Federal, State of foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year. The term shall not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices or (b) any state offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiciton in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

* * * * *

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SUPREME COURT, U.S.
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No. 03-750

IN THE

Supreme Court of the United States

GARY SHERWOOD SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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ARGUMENT

READING THE STATUTE AS A WHOLE RATHER THAN ONE TERM IN ISOLATION, "CONVICTED IN ANY COURT OF A CRIME" PUNISHABLE BY OVER ONE YEAR IN PRISON REFERS TO A FEDERAL OR STATE COURT

A. "Any Court" Refers to a Court in the United States

1. This case involves what it means to be "convicted in *any court* of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). '[A]ny' can and does mean different things depending upon the setting." *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004). The question is "how Congress could have envisioned" a provision "actually working" if applied expansively, and avoiding "strange and indeterminate results."[1] *Id.*

It is not disputed that "the word 'any' has an expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997); US Br. 10. The question here, however, is whether "court," read in context, means Federal and State courts. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), notes:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in

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[1] It is suggested that *Nixon* was decided wholly on federalism grounds. US Br. 11 n.4. However, *Nixon* rejected a broad reading of "any entity" due to the "futility and uncertainty" of that reading, finding the federalism concern to be "a complementary principle." 124 S. Ct. at 1566.

> isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ." (Citations omitted).

Ignoring context, the United States argues that § 922(g)(1) "'could not be more plain,' . . . in its intent to cover convicted felons broadly without geographic limitation." Br. 11, quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980). This is the first of several instances in which *Lewis* is cited for such sweeping statements. Yet *Lewis* construed 18 U.S.C. App. § 1202(a)(1), which applied to a person who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." Arguing that § 922(g)(1) applies to all "felons" begs the question of who Congress considered to be "felons."

The United States pushes the envelope by asserting that "any court" includes "military courts." Br. 12. That would include military courts in Saddam Hussein's Iraq and today's Sudan. The stretch is needless, for § 922(g)(6) prohibits firearm receipt by a person "who has been discharged from the Armed Forces under dishonorable conditions."[2] This is another instance in which Congress limited the scope of the prohibition to action by American institutions – in this case, "the Armed

[2] "Congress intended the dishonorable discharge, and not conviction of an offense punishable by more than a year's imprisonment, to be the litmus test of arms ownership following a court-martial." David T. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumb. L. Rev.* 585, 642-43 n.315 (1986/1987).

Forces" mean the U.S. Armed Forces, not the Armed Forces of, say, Belgium or Cuba.[3]

2. The United States argues that the phrase "any court" contrasts with other provisions which explicitly refer to Federal or State convictions. Br. 12. Yet § 921(a)(20) itself does this by excluding "any Federal or State offenses pertaining to antitrust violations," "any State offense" (but not any Federal offense) which is a misdemeanor punishable by two years or less, and civil rights restorations which have meaning only in the context of State and Federal law.

Section 922(g)(9) refers to being "convicted in *any court* of a misdemeanor crime of domestic violence," but that does not mean any court in the world, as it means a conviction which is "a misdemeanor under Federal or State law." § 921(a)(33)(A). Congress may have thought the reference to Federal or State law to be necessary in light of decisions construing § 922(g)(1) to include foreign convictions.

18 U.S.C. § 924(e)(1) imposes enhanced penalties on a person who "violates section 922(g) of this title and has three previous convictions by *any court* referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both . . . ." The referenced "convictions by *any court*" are limited to two categories of crimes that are defined as violations of Federal or State law only.

First, "serious drug offense" is defined as specified drug offenses under the U.S. Code or "an offense under State law" involving drugs with certain criteria. § 924(e)(2)(A). Foreign

[3] Surely the United States would not suggest otherwise, despite language in a separate law restricting receipt of a biological agent by one who "has been discharged from the *Armed Services of the United States* under dishonorable conditions." 18 U.S.C. § 175b(d)(2)(H).

convictions are thereby excluded.

Second, "violent felony" is defined as a crime punishable by over one year's imprisonment which involves physical force against a person, burglary, or other specified offenses. § 924(e)(2)(B). This Court has interpreted these crimes to mean Federal or State offenses in *Taylor v. United States*, 495 U.S. 575, 579 (1990).

The predecessor of § 924(e) was the 1984 version of § 1202(a), which defined burglary as unlawful entry of a building "with intent to engage in conduct constituting a *Federal or State offense*." § 1202(c)(9) (emphasis added), in *Taylor*, 495 U.S. at 581. "In 1986, § 1202 was recodified as 18 U.S.C. § 924(e) by the Firearms Owners' Protection Act ["FOPA"], Pub. L. 99-308, § 104, 100 Stat. 458." 495 U.S. at 582.

Since the definition of "burglary" was later deleted, *Taylor* decided: "We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. This Court did not suggest that a foreign conviction would apply or that the criminal codes of foreign countries would be applicable.

Congress knows how to refer to foreign jurisdictions in firearms statutes when it wishes to do so. It has prohibited use of funds under the Freedom of Information Act "with respect to records . . . provided by Federal, state, local or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm . . . ." Division J., Title 6, § 644, of Consolidated Appropriations Resolution, P.L. 108-7, 117 Stat. 11 (2003). No comparable language appears here.

3. The United States asserts, "This Court has long recognized that Congress, in Section 922(g), 'was reaching far and was doing so intentionally.'" Br. 13, quoting *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983). Yet

Dickerson only stated that both felons and indicted persons were prohibited from receipt of firearms. *Id.* FOPA overruled *Dickerson*'s holding that State law did not govern whether a person was convicted.[4]

4. The United States seeks deference to agency opinion, noting ATF's 1987 regulation including a foreign offense as a disabling conviction. Br. 14. Yet "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring).[5] *United States v. Gayle*, 342 F.3d 89, 93 n.4 (2nd Cir. 2003), noted:

> [B]oth parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), even if the statute were ambiguous. Moreover, ATF made clear in its explanation that its inclusion of foreign convictions was based solely on the fact that courts have so construed the statute.

The National Instant Criminal Background Check System ("NICS") accesses other record systems which include some foreign criminal history records. US Br. 15. However, the Brady Act, which established NICS, addresses Federal and State records exclusively, mentioning nothing about foreign

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[4] Senate Report 98-583, 98th Cong., 2d Sess., 7 & n.16 (1984) (noting that FOPA "would leave such a determination to the states and would render the *Dickerson* decision inapposite").

[5] "[J]udges do not defer to the Attorney General's interpretation of Title 18." *Evans v. U.S. Parole Com'n*, 78 F.3d 262, 265 (7th Cir. 1996).

records. *See* Pet. Br. 41-44.

B. Congress' Purpose is Met by Applying the Law as Written, Not by Enlarging its Scope

Congress' purpose in § 922(g)(1) is revealed by the specific classes of persons included and excluded by § 921(a)(20). That purpose is not found by conceiving of other "potentially dangerous persons." *See* US Br. 15. "The policy arguments forwarded by the Secretary [ATF] with respect to enforcement 'should be directed to the Congress rather than to [the courts].'" *NRA v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

The United States suggests that explanations of § 1202(a) imply that foreign convictions are included. Br. 16, quoting *Scarborough v. United States*, 431 U.S. 563, 573 (1977) ("noting congressional purpose to keep firearms away from those 'whose prior behaviors have established their violent tendencies'"). That quotation was from Senator Long, sponsor of Title VII, and similar statements by others also concerned Title VII – which encompassed, as provided by § 1202(a), only Federal and State convictions.[6] None of them implied that the law would include foreign convictions.

The United States attributes to *Huddleston v. United States*, 415 U.S. 814, 824 (1974), agreement that foreign

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[6] 114 Cong. Rec. 14,773-14,774 (1968) (Sen. Long remarks introducing Title VII); *id.* at 16,298 (Rep. Pollock) (remark about "criminals" directed to Title VII). Sen. Tydings referred to "a local ordinance" prohibiting firearm receipt by a person with "a criminal record." *Id.* at 13,220.

convictions were included. Br. 17. *Huddleston* stated:

> The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S Rep No. 1501, 90th Cong, 2d Sess, 22 (1968).

415 U.S. at 824. This is the same Senate Report No. 1501 with the words: "The term 'felony' means, in the case of a Federal law, an offense punishable by imprisonment for a term exceeding one year, and, in the case of a State law, an offense determined by the laws of the State to be a felony." *Id.* at 56.

The United States (Br. 17) quotes *United States v. Bass*, 404 U.S. 336, 345 (1971), about "especially risky people," but *Bass* concerned § 1202(a), under which such risky people were persons with Federal or State convictions.

C. The Structure and Context of the Gun Control Act Confirm that "Any Court" Means Federal and State Courts

1. Potentially-dangerous foreigners are the subject of § 922(g)(5), US Br. 18, which prohibits firearm receipt by any person:

> who, being an alien –
>
> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)) . . .

The ban on firearm receipt by illegal aliens is how Congress sought to punish foreign criminals who come to the United States and acquire firearms. Title VII declared Congress' intent to disarm "felons" and "aliens who are illegally in the country," § 1201, and made firearm receipt unlawful by persons convicted of Federal or State felonies and by illegal aliens. § 1202. FOPA consolidated all prohibited persons into § 922(g), including, inter alia, "convicted felons" and "illegal aliens." Senate Report 98-583, *supra*, at 12.

Congress prohibited firearm receipt by illegal aliens in order to address what the United States characterizes as "the dangers posed by individuals coming into the United States from abroad and purchasing firearms."[7] Br. 19. While this broad net would not include the handful of American citizens who are convicted of crimes in foreign countries, Congress is not required to solve every problem, and countervailing reasons existed not to criminalize firearm receipt by American citizens convicted in foreign countries.

The United States notes "the dangers posed by individuals who engage in gun trafficking across national boundaries," Br. 19-20, but that subject is irrelevant to whether "convicted in any court" includes only Federal and State convictions. A law interpreted as punishing international drug trafficking has no pertinence here. US Br. 19, citing *United States v. Kole*, 164 F.3d 164, 175 (3d Cir. 1998), *cert. denied*,

[7] The same objective is served by the prohibition on firearm receipt by foreigners here on non-immigrant visas, which was enacted in 1998 and which has liberal exemptions. *See* 18 U.S.C. § 922(y); 144 Cong. Rec. S8639 ff. (1998) (remarks of Sen. Durbin).

526 U.S. 1079 (1999).[8] Exemplifying the Gun Control Act's focus on Federal and State convictions, enhanced penalties under § 924(e) for drug offenses are imposed only on a person convicted under Federal or State law. § 924(e)(2)(A).

2. The United States points to other portions of the U.S. Code which allegedly use the phrase "convicted in any court" to include foreign convictions, but cites no cases so holding. Br. 20-21. 18 U.S.C. § 175b(a) prohibits receipt of a biological agent or toxin by a person who "has been convicted in any court of a crime" punishable by more than one year. § 175b(d)(2)(B). No cases have construed this provision, which includes no comparable references to Federal and State law as set forth in § 921(a)(20).

18 U.S.C. § 842(i)(1) prohibits receipt in commerce of an explosive by a person who "has been convicted in any court of a crime" punishable by more than one year. Excluded from that term are "Federal or State offenses pertaining to antitrust violations" and "any State offense classified by the laws of the State as a misdemeanor" and punishable by two years or less. § 841(l). No reported cases on foreign convictions exist.

The United States cites to a provision "within the gun control law itself," Br. 21 n.12, noting that 18 U.S.C. § 930(g)(3) explicitly refers to "any court of the United States." But that is in the context of a prohibition on possession of a firearm "in a Federal court facility." § 930(e). Without the

[8] 21 U.S.C. § 960(a) punishes drug offenses specified in the U.S. Code, and § 960(b)(1) imposes an enhanced sentence on one who "commits such a violation after a prior conviction for a felony drug offense." *Kole* held that such "prior conviction" included a Philippine conviction based on sufficient due process. However, § 960(b)(1) includes no comparable references to Federal and State law as does § 921(a)(20).

reference to "any court of the United States," the provision might be construed to apply to State courts. But even if it referred only to "any court," no one would interpret that to include foreign courts.[9]

D. The Exclusion of Federal and State Business Crimes, State Misdemeanors, and Restorations of Civil Rights Clarifies that Foreign Convictions Are Not Included

The United States makes the counter-intuitive argument that the references in § 921(a)(20) to Federal and State crimes means that foreign convictions are included. Br. 22. To the contrary, these references are incompatible with recognition of foreign convictions.

First, it is suggested that if "any court" only means Federal and State courts, no reason exists to refer to "any *Federal or State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . ." § 921(a)(20)(A). Yet that language clarifies that both Federal and State offenses are included, and not, for instance, just Federal offenses.

That is made clear by the succeeding reference to "any *State offense* classified by the *laws of the State* as a misdemeanor and punishable by a term of imprisonment of two years or less." § 921(a)(20)(B). That precludes exempting from the prohibition any *Federal offense* classified by the *laws*

[9] 15 U.S.C. § 8 prohibits trusts in restraint of trade and, "on conviction thereof in any court of the United States," punishes the violator. Had that been worded "in any court," it still would have meant only a court of the United States, for only there would one be tried for a federal offense.

of the United States as a misdemeanor and punishable by imprisonment for two years or less. This undercuts the suggestion that if "any court" only means Federal and State courts, "there would have been no need to include the modifier 'State' for the misdemeanor offenses" in this provision. US Br. 22.

Second, the United States speculates that Congress was "quite familiar" with and thus exempted the specified Federal and State business crimes, but intended to include comparable foreign business crimes as disabling, because it did not know whether "analogous conduct in foreign jurisdictions would lead to felony convictions in the first place." Br. 23. That makes no sense, for if the person had no felony conviction, the issue would not even arise. It is further suggested that Congress did not know whether an exemption for foreign business crimes would apply only to "non-dangerous individuals." Br. 23-24. Yet it is unclear why a foreign antitrust violator would be any more dangerous than an American one. *See United States v. Concha*, 233 F.3d 1249, 1254 (10th Cir. 2000) (noting "the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes").

Third, it is true that statutes may not be disregarded just because they may entail peculiar results. US Br. 24-25. But when the text is not clear, irrational results should be avoided. The text does not clearly include foreign convictions, and it is unclear why Congress would exempt Federal and State antitrust violators but include foreign ones, or would exempt certain American State misdemeants but not Canadian ones.[10]

[10] By contrast, § 921(a)(20)(B) clearly does not exempt Federal misdemeants of the same type, and Congress need not specify any basis for this difference.

The United States worries that persons convicted of murder and terrorism abroad may come to the United States and obtain firearms. Br. 26. Congress addressed that problem by prohibiting firearm receipt to any alien who "is illegally or unlawfully in the United States." § 922(g)(5)(A). Aliens convicted of serious crimes and terrorists cannot lawfully enter the United States,[11] and if they slip past our borders, they are illegal aliens subject to § 922(g)(5). While that does not include U.S. citizens convicted by a foreign court, such instances are rare, and Congress is not required to address every conceivable problem.

The United States cannot reconcile § 922(g)(9)'s reference to one "convicted *in any court* of a misdemeanor crime of domestic violence," with § 921(33)(A)'s definition of the crime as "a misdemeanor under Federal or State law," precluding foreign law. It asserts that Small's reading "would leave the phrase 'Federal or State law' no work to do," Br. 27, but Congress may well have used that language to preclude any overexpansion of the crime to include foreign convictions, as had taken place with the provision at issue here.[12] No reason

[11] Aliens convicted of specified crimes, involved in terrorism, and similar classes are ineligible for admission to the United States. 8 U.S.C. § 1182(a)(2). Interestingly, such crimes include "a violation of . . . any law or regulation of a State, the United States, *or a foreign country* relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." § 1182(a)(2)(A)(i)(II).

[12] It is claimed that under Small's approach, "a person convicted of violating a restraining order by telephoning his estranged wife is barred for life from possessing firearms," but that person could commit a murder abroad and then buy a gun here. Br. 27. No such law exists. Section 922(g)(8) bars firearm receipt to one "who *is* subject" to certain restraining orders, but that expires with the expiration of the restraining order.

has been suggested why "any court" would mean anything different in § 922(g)(1) and (9).

The government is silent on the last two sentences of § 921(a)(20). First, "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." That was a FOPA amendment mandating that State law controlled in lieu of a Federal standard. *Beecham v. United States*, 511 U.S. 368, 373 (1994). As it stands, federal courts in any given State must decide questions of the laws of any of the fifty States.[13] But Congress did not intend for U.S. courts to determine the law of foreign nations, states, and localities.

Secondly, the government ignores the person who "has had civil rights restored" and the other exclusions in the last sentence of § 921(a)(20). These exclusions only make sense in the context of restoration of rights under the laws of the States and of the United States. Restoration of the rights to vote, to run for office, and to serve on a jury typically restore the right to possess a firearm. *E.g.*, *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990). Under the government's reading, Federal courts would have to decide whether civil rights are restored under the laws of any country and political subdivision in the world. Congress intended no such result.

E. The Legislative History Precludes Application of Foreign Convictions

1. Congress has a long tradition of prohibiting firearm

[13] *E.g.*, *United States v. Oman*, 91 F.3d 1320, 1322 (9th Cir. 1996) (Arizona district court must decide whether civil rights restored under Massachusetts law).

receipt based on felony conviction in Federal and State courts. US Br. 29. But it is inaccurate to assert that Congress "deleted *those* limitations" through amendments to "enlarge[] the group of people coming within the Act." US Br. 29, quoting *Bass*, 404 U.S. at 343 n.10. *Bass* involved § 1202(a), which recognized only Federal and State convictions.

The United States argues that Congress did not find references to Federal and State courts unnecessary, for it used them in the exclusion of antitrust crimes and in the definition of misdemeanor crime of domestic violence. Br. 30. Yet existing references to the Federal and State courts clarify the law and do not imply that foreign courts are included.

2. Senate Report No. 1501, at 56, proposed that "felony" in the Gun Control Act be defined solely in terms of Federal and State law. The Conference Report adopted the House language instead, but did not suggest any substantive difference. Gun Control Act of 1968, Conference Report, Report 1956, House Committee on the Judiciary, 90th Cong., 2d Sess., 28-29 (1968). *See United States v. Gayle*, 342 F.3d 89, 94-95 (2nd Cir. 2003).

The United States argues that "Those reports *postdate* by three and four months respectively Congress's enactment of the 'any court' language in Section 922(e) of the 1968 Omnibus Act." Br. 31. However, the Gun Control Act *superseded* Title IV of the Omnibus Act, which included that provision. § 102, P.L. 90-681, 82 Stat. 1213, 1214 (1968).

While the Senate language was not enacted, it expressed the understanding of Congress. The *only* substantive difference resolved in favor of the House version was that "the crime referred to in the House bill is one punishable by imprisonment for more than 1 year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony."

Report 1956 at 28-29. Note the common use of the term "the crime," without any implication that the Senate bill was seen as having, in the United States' words, "restricted the courts that could enter triggering felonies." Br. 32.

3. FOPA "repeals Title VI of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. app. 1201-1203). These provisions are merged into similar provisions in 18 U.S.C. 922 . . . ." Senate Report 98-583, *supra*, at 30. Section 1202(a)'s reference to conviction by Federal or State courts appeared more concisely in FOPA as "convicted by any court."

The United States objects that Senate Report 98-583 concerned an "unenacted bill," S. 914, rather than S. 49, which was enacted as FOPA. Br. 32 n.22. However, the version of § 921(a)(20) in S. 914 was exactly as passed in FOPA.[14] Moreover, the Report's discussion of the revisions presuppose conviction by a Federal or State court, and no other. *Compare* Pet. Br. 37-39 *with* US Br. 33.

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), set up background checks for Federal and State convictions, and is silent on foreign convictions. *See* Pet. Br. 41-44. That records of some foreign convictions might be accessed by the system, US Br. 34, misses the point that Congress passed no such provision in the Act.

The Brady Act established procedures to correct erroneous Federal and State records which result in denial of a

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[14] Senate Report 98-583 at 42; P.L. 99-308, 100 Stat. 449, 450 (1986). "S. Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub. L. No. 99-308." *NRA v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

firearm. § 103(g); 18 U.S.C. § 925A. This was intended to protect the rights to keep arms and to due process.[15]

The United States attributes to Congress an intent to recognize foreign convictions which, if erroneous, cannot be corrected. Br. 34-35 n.24. An American citizen can thereby be denied receipt of a firearm based on erroneous information and has no remedy. Given its concern with Second and Fifth Amendment rights, Congress intended not to recognize foreign convictions.

F. Congress Did Not Intend that Firearm Ownership Be Denied to American Citizens Based on Foreign Convictions, Which Do Not Meet American Standards of Justice

Interpreting the law to apply to convictions by any court in the world would lead to absurd results. "A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States v. Ryan*, 284 U.S. 167, 175 (1931). The world is awash with dictatorships, and even our Allies have inquisitional legal systems which fail to meet American standards of justice.

The leading sponsor of the Gun Control Act was Senator Thomas J. Dodd. *See* 113 Cong. Rec. 3255 (1967)

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[15] Rep. Hoekstra wished to "guarantee the second amendment rights of citizens by requiring law enforcement officials to provide written documentation for any denials that might be rendered." 139 Cong. Rec. H9111 (1993). Rep. Brooks noted that "as this bill is written, a person can be denied the right to make a lawful handgun purchase – without any cause, and without any explanation. What could be more fundamental to due process than to require the Government to tell you why you cannot exercise a right that is being exercised by others every day?" *Id.* at H9122.

(introduction of S. 1, Amend. 90). Having been a prosecutor at the Nuremberg war crimes trials, Dodd would not have been one to recognize foreign convictions. He prosecuted Nazis for having prosecuted Jehovah's Witnesses in the courts and sent them to concentration camps. *Nuremberg Trial Proceedings*, vol. 3, at 497.[16]

FOPA was signed by President Ronald Reagan, who praised Aleksandr Solzhenitsyn for exposing Soviet totalitarianism – including its judicial system – in *The Gulag Archipelago* (1974). Since Solzhenitsyn had been convicted of anti-Soviet crimes and sentenced to eight years, would it have been a felony for him to receive a firearm after he moved to the United States? Is that what Congress intended under FOPA, with its findings in favor of "the rights of the citizens" under the Second, Fourth, and Fifth Amendments? § 1(b), 100 Stat. 449.

"In contrast to what is permitted under other legal systems, the Constitution of the United States mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be prohibited with sufficient specificity to forewarn of the proscription of said conduct." *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985). Soviet law recognized "crimes by analogy" for "any socially dangerous act" not directly defined by law. *Id.* n.1. Even in England, "all such acts or attempts as tend to the prejudice of the community, are indictable." *Rex v. Manley*, 1 K.B. 529, 534 (1933).

Nor should one forget the American women "accused

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[16] Germans were convicted of "vulgarly defam[ing] the Führer" and listening to foreign radio broadcasts. Inge Scholl, *The White Rose* 120 (1983).

by the Taliban of preaching Christianity," a serious offense.[17] Or Iran's crackdown on women who flout the Islamic dress code during the hot summer,[18] or the history professor convicted of "insulting Islamic sacred beliefs."[19]

1. The United States argues that foreign convictions count, in that a potentially unconstitutional State conviction did not void the prohibition of former §1202(a)(1). Br. 36, citing *Lewis*, 445 U.S. at 60-67; *id.* at 58 n.4. Disregarding the logical leap, *Lewis* involved convictions by the States, which operate under American criminal justice procedures.

2. Foreign convictions may be recognized for extradition purposes. US Br. 38-39. That is irrelevant here.

Foreign convictions are considered in the U.S. immigration laws. US Br. 41, citing 8 U.S.C. 1101(a)(43). But that applies only to aliens, not to U.S. citizens. Bill of Rights guarantees apply to members of our national community, not to aliens in foreign lands. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

Foreign convictions are not included in computing criminal history under the Sentencing Guidelines. Guidelines § 4A1.2(h); US Br. 42-43. However, the following may be considered for an upward departure:

> (A) Prior sentences(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses). . . .
>
> (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

Id., § 4A1.3(a)(2). Thus, foreign convictions are treated no better than bad conduct with no conviction.

3. The United States argues that, *if* the fairness of a foreign conviction is considered, it should "require nothing more than the most fundamental rudiments of fair process." Br. 45. This rejects what appears superficially to be a more searching probe approved by the court below based on the *Restatement (Third) of Foreign Relations Law of the United States* § 482 cmt. b (1987), cited in App. 5-7a.

The approach of the court below leaves the public without knowledge of the law. If "the court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness," App. 4a, one would not have that information until the court so decides. With a State or Federal conviction, no such vagueness exists – a person is on notice that receipt of a firearm is unlawful.

Reliance on the *Restatement* only compounds the vagueness here. *Sabetti v. Dipaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (opinion by Breyer, C.J.) explains:

> "It is not enough" . . . for the true meaning of the statute "to be apparent elsewhere," in extra-textual materials . . . . The idea is that ordinary individuals trying to conform their conduct to law should be able to do so by reading the *face* of a statute – not by having to appeal to outside legal materials. (Citation omitted.)[20]

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[17] AP release, Nov. 15, 2001, http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2001/11/15/international2356EST0968.DTL.

[18] http://news.bbc.co.uk/2/hi/middle_east/3827101.stm.

[19] *Washington Post*, July 21, 2004, A14.

[20] If the necessary fiction that one is presumed to know the law from the statutes "descends to needless farce when the public is charged even with knowledge of Committee Reports," *United States v. R.L.C.*, 503 U.S. 291, 30 (1992) (Scalia, J., concurring), it is worse when the public is charged with knowledge of esoteric items like the *Restatement*.

4. The rule of lenity must be applied to avoid vagueness. *Cf.* US Br. 46. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999). Both concerns exist here.

Whether one has been convicted of a disabling crime "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held," and involves such questions as whether one "has had civil rights restored." § 921(a)(20). If applied to foreign law, this does not provide due notice to ordinary people of what is prohibited. It need not be proven that the defendant knew that he was a felon, *United States v. Capps*, 77 F.3d 350, 353 (10th Cir. 1996), yet "the absence of a scienter requirement" may render a statute "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Given that the police and courts must decide questions of foreign law – not just the laws of Arizona or Maine, but those of Sudan and the Ukraine – arbitrary and discriminatory enforcement will be encouraged.

The above vagueness evaporates by applying the rule of lenity, in which "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347-48. The terms "convicted in any court" mean convicted by a Federal or State court.

CONCLUSION

This Court should reverse the judgment of the court of appeals and vacate the conviction.